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Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502

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Broun and Capra: Getting Control of Waiver of Privilege in the Federal Courts: A P
GETTING CONTROL OF WAIVER OF PRIVILEGE
IN THE FEDERAL COURTS:
A PROPOSAL FOR A FEDERAL RULE OF EVIDENCE 502

KENNETH S. BROUN
DANIEL J. CAPRA*

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I. INTRODUCTION

Today's litigators—and their clients—will tell you that litigation in cases involving voluminous documents is a harrowing and enormously expensive business. The problems were serious enough when most documents were on paper. The difficulty of the situation is exacerbated in what has become the ordinary case where many, if not most, of the documents either exist or are preserved electronically.¹

Among the most difficult problems is guarding against disclosure of documents that may be protected by the attorney-client privilege or subject to work product protection.² Many courts will hold that even an inadvertent or unintentional disclosure of a document in discovery will result in the forfeiture or waiver³ of the privilege or protection.⁴ Many courts, irrespective of their treatment of inadvertent disclosure, hold that when waiver is found to exist it covers not only the document itself but also any communication dealing with the same subject matter.⁵

Thus, counsel must carefully review all documents to assess the possible application of privilege or work product protection. In the not-so-infrequent case involving millions of documents, such a review will cost the client hundreds of thousands of dollars.⁶ An innocent slip-up by a paralegal charged with reviewing

1. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 56–57; Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1610–11 (1986); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 864 (1998).

2. Documents protected by other evidentiary privileges, including the psychotherapist-patient and various governmental privileges, may also be at risk. However, especially in private corporate litigation and in controversies between corporations and government agencies, counsel's most pervasive worries concern the attorney-client privilege and work product protection. For that reason, as well as a concern that too broad of a rule would run the risk of being both over- and under-inclusive, the Rule proposed in this Article deals only with attorney-client privilege and work product protection. In addition, see *infra* note 262, addressing the possible constitutional implications of a rule that attempted to include a broad set of evidentiary privileges.

3. The term "waiver" is used throughout this article and in the Proposed Rule to describe a loss of a privilege or protection as a result of disclosure of protected material, regardless of whether that disclosure was intended. An unintentional disclosure of privileged matter should more correctly be considered a "forfeiture" of the privilege rather than a waiver, which implies an intentional relinquishment of the protection. Nevertheless, courts have consistently used the term waiver rather than forfeiture in connection with unintentional disclosures. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE 9 (Revised 2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> [hereinafter REVISED JUDICIAL CONFERENCE REPORT ON FEDERAL RULES OF CIVIL PROCEDURE] (quoting MANUAL FOR COMPLEX LITIGATION, *supra* note 1, at § 11.446) (using the term waiver in connection with inadvertent disclosure of privileged material); *infra* notes 63–76 and accompanying text.

4. See *infra* notes 42–53 and accompanying text.

5. See *infra* notes 75–89 and accompanying text.

6. For a case from almost thirty years ago involving 17 million pages of documents, see *Transamerica Computer Co. v. IBM*, 573 F.2d 646, 648 (9th Cir. 1978). The problems experienced in *Transamerica* have grown even more common and complex with the proliferation of electronically created and maintained documents. See also *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205

documents may have catastrophic implications for the case in which the discovery took place and in other litigation involving the same documents or issues.

Furthermore, the law governing waiver may cause counsel to include documents in her privilege log that are of no concern to the client. For example, assume an imagined, but not unlikely, circumstance in which a cover letter transmitting a contract to a party's attorney is inadvertently disclosed during discovery. The cover letter itself may say nothing about the substance of the contract or in any way disclose confidential information about any matter. However, the letter is a communication in the course of seeking legal advice and is therefore likely to be covered by the attorney-client privilege. If covered by the privilege, a disclosure of the letter to opposing counsel during discovery would constitute a waiver of the privilege with regard to that document. But more significant than the waiver with regard to the disclosed document is the possibility, indeed the likelihood in many courts, that the waiver will extend to all communications on the same subject matter—in this instance, the attached contract.⁷

Counsel for both sides in cases involving a large number of documents frequently enter into “claw back” or “quick peek” agreements that permit disclosure of privileged documents without waiver of privilege. These agreements are often embodied in a court order. The *Manual for Complex Litigation* acknowledges the existence of such agreements:

A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to

F.R.D. 421, 425–26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mails, the estimated cost of pre-production review for privileged and work product material would cost one defendant \$247,000 and another \$120,000, and such review would take months); Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 RICH. J.L. & TECH. 15, ¶ 4 (2006), <http://law.richmond.edu/jolt/v12i4/article15.pdf> (“[C]omputer users sent approximately 31 billion e-mail messages every day in 2002, ‘a figure which [was] expected to double by 2006.’”) (quoting PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION? 2003 pt. IV.C (2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_execsum.pdf)).

7. Such a draconian result would be consistent with language in many cases to the effect that a disclosure of a privileged document “will be deemed to encompass ‘all other such communications on the same subject.’” *E.g.*, *Texaco P.R., Inc. v. Dep’t. of Consumer Affairs*, 60 F.3d 867, 883–84 (1st Cir. 1995) (quoting *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981)); *In re Sealed Case*, 877 F.2d 976, 980–81 (D.C. Cir. 1989) (reaffirming that “a waiver of the privilege in an attorney-client communication extends ‘to all other communications relating to the same subject matter.’” (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982))); *see infra* Part III.

stipulate at the outset of discovery to a “nonwaiver” agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to “take back” inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.⁸

The recently amended Federal Rules of Civil Procedure specifically recognize the existence of such agreements by providing that if the parties can agree to an arrangement that protects against waiver and allows production without a complete privilege review, the court may enter a case-management order adopting that agreement.⁹

However useful claw back or quick-peek agreements are between the parties to the case, the agreements cannot give counsel and their clients total comfort. At least in the absence of legislation, such agreements cannot bind persons or entities not party to them.¹⁰ Under present law, even a court order declaring the continuing viability of the privilege may not be effective against someone not a party to the litigation.¹¹ Thus, with a non-party’s possible claim of waiver hovering in the future, the necessity of a thorough and costly review of all documents produced still exists.

Litigation involving millions of documents is not the only situation in which waiver of privilege presents a problem. Another equally difficult but different issue concerns waiver of the privilege in connection with investigations by government agencies. In the course of an investigation, a government agency, such as the Securities and Exchange Commission (SEC), may seek the cooperation of the target of its investigation through a request to turn over documents relating to the matter

8. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 1, at § 11.446.

9. See FED. R. CIV. P. 16(b)(6) advisory committee’s note (discussing the 2006 amendment); *Id.* 26(f)(4) advisory committee’s note (same).

10. The principle is a long recognized one, perhaps seldom litigated because of its obviousness. Directly on point is *Hartford Fire Insurance Co. v. Guide Corp.*, 206 F.R.D. 249 (S.D. Ind. 2001), in which the court held an agreement regarding the waiver of privileges could not bind third parties. *Id.* at 250. The basic principle was stated by Judge Learned Hand: “[N]o court can make a decree which will bind any one but a party.” *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930); see also *United States v. Kirschenbaum*, 156 F.3d 784, 794–95 (7th Cir. 1998) (holding the district court had no power to issue a restraining order seizing assets that would be binding on defendant’s wife, a non-party); *Mitchell v. Exide Techs.*, No. 04-2303-GTV-DJW, 2004 WL 2823230, at *1 (D. Kan. 2004) (discussing how a protective order preserving confidentiality of business information disclosed in discovery was not binding on non-parties).

An analogous situation is the ineffectiveness of confidentiality agreements between federal agencies and the targets of their investigations with regard to non-parties to the agreements. See *In re Qwest Commc’ns Int’l Inc. Sec. Litig.*, 450 F.3d 1179, 1194 (10th Cir. 2006), *cert denied sub nom.*, *Qwest Commc’ns Int’l Inc. v. New England Health Care Employees Pension Fund*, No. 06-343, 2006 U.S. LEXIS 8627 (U.S. Nov. 13, 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303–04 (6th Cir. 2002); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). For a more detailed analysis of situations where courts have rejected the doctrine of selected waiver when parties had a confidentiality agreement, see *infra* Part IV.C.

11. See *Marcus*, *supra* note 1, at 1612.

in question.¹² The agency may ask that the target waive any privilege that may exist with regard to the documents produced.¹³ The production of documents is often accompanied by an agreement that the documents produced will not be disclosed to private parties unless there is a public prosecution with regard to the matter.¹⁴

A crucial issue, especially for the target of the investigation, is whether, when documents are produced under these circumstances, the target has waived the privilege only in regard to the government agency or whether the target has waived the privilege in regard to the entire world. Almost every federal court that has considered the question has held that a party gives a general waiver of the privilege under these circumstances, even if there is an agreement between the agency and the target to maintain confidentiality of the material produced.¹⁵ Courts refer to this issue by saying that they do not recognize “selective waiver” of privilege.¹⁶

Reasonable persons may differ as to the best policy on all of these issues. The failure to excuse inadvertent waiver may be beneficial in that the consequences of waiver require counsel to be careful in responding to discovery requests.¹⁷ Finding a broad scope of waiver not only further encourages care in disclosure, but also prevents a party from disclosing some communications with regard to a matter while hiding behind privilege with regard to other related communications.¹⁸ A refusal to recognize selective waiver arguably protects the interests of the public at large and takes the use of materials disclosed by the target of an investigation out of the sole discretionary use of a governmental agency.¹⁹ Many lawyers, including some representing corporations that have been the target of a governmental agency investigation, have also argued the recognition of selective waiver would encourage and exacerbate an existing trend by regulators and prosecutors to demand that

12. ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 BUS. LAW. 1029, 1046–48 (2005).

13. *See id.* at 1047.

14. *See Westinghouse*, 951 F.2d at 1226–27.

15. *See discussion infra* Parts IV.B–C.

16. *See, e.g., Westinghouse*, 951 F.2d at 1425 (refusing to adopt selective waiver as a third exception to the waiver doctrine).

17. *See, e.g., Int'l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 450 (D. Mass. 1988) (“[A] strict rule that ‘inadvertent’ disclosure results in a waiver of the privilege would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure.”). For more detailed analysis of the *International Digital Systems Corp.* court’s decision, *see infra* notes 47–50 and accompanying text.

18. *See, for example, United States v. Doe (In re Grand Jury Proceedings)*, 219 F.3d 175, 186–87 (2d Cir. 2000), *rev'd*, 350 F.3d 299 (2d Cir. 2003), for a discussion of how a party might attempt to disclose only some aspects of related communications. *See also infra* Part III.

19. Similar views were expressed by witnesses in a hearing held by the Federal Rules of Evidence Advisory Committee on April 24, 2006. ADVISORY COMM. ON EVIDENCE RULES, HEARING ON PROPOSAL 502, at 15, 16 (Committee minutes Apr. 24, 2006) [hereinafter HEARING ON PROPOSAL 502], available at http://www.uscourts.gov/rules/EV_Hearing_April_2006.pdf (last visited Nov. 10, 2006). Also see the submission of Gregory P. Joseph in connection with that hearing. Memorandum from Gregory P. Joseph on Privilege Waiver Rule to the Fed. Rules of Evidence Advisory Comm. 7–8 (2006), available at <http://www.uscourts.gov/rules/Joseph.pdf> (last visited Nov. 10, 2006).

persons being investigated waive their attorney-client privileges and work product protection.²⁰

Yet, there are strong policy reasons for privilege waiver rules that would clarify and, at least to some degree, change the law of waiver of privilege. A rule that any disclosure of a document necessarily waives attorney-client privilege or work product protection as to all communications dealing with the same subject matter confronts counsel with a difficult choice—either spend enormous resources on protecting the privileges or risk losing their protection. Where the law on inadvertent waiver or scope of waiver is unclear, the lack of a consistent response by the courts makes counsel's choice of a less than full review unnecessarily risky. The refusal to recognize selective waiver in all but one federal circuit²¹ means clients must risk private parties' use of the materials produced, or the government agency will be denied the benefit of full cooperation from a target of its investigation.

The court decisions—even within the federal system—have not given a uniform answer to the issues of inadvertent waiver, scope of waiver, and selective waiver.²² If there is going to be a consistent solution, it is going to have to come by rule or statute. However, if there is to be a rule dealing with the issue, it will almost certainly have to be enacted by Congress rather than going through the Rules Enabling Act²³ process.

20. See Memorandum from David M. Brodsky, Steven K. Hazen, R. William Ide & Mark O. Kasanin on Preserving the Attorney-Client Privilege to the Fed. Rules of Evidence Advisory Comm. 3 (Apr. 19, 2006) [hereinafter Preserving the Attorney-Client Privilege], available at <http://www.uscourts.gov/rules/Brodsky.pdf> (last visited Nov. 10, 2006). With regard to the general concern about the erosion of the attorney-client privilege and work product protection, see ABA Task Force on the Attorney-Client Privilege, *supra* note 12, at 1047–50; JOINT DRAFTING COMM., AMERICAN COLLEGE OF TRIAL LAWYERS, THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS 9–13 (2002), available at <http://actl.com/content/navigationmenu/publications/allpublications/default.htm> (follow “2002:THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS” hyperlink) (last visited Nov. 10, 2006). Compare this view with that expressed by the amici curiae in *In re Qwest Communications International Inc. Securities Litigation*, 450 F.3d 1179, 1199–1200 (10th Cir. 2006), *cert denied sub nom.*, *Qwest Communications International Inc. v. New England Health Care Employees Pension Fund*, No. 06-343, 2006 U.S. LEXIS 8627 (U.S. Nov. 13, 2006), discussed *infra* in note 193 and accompanying text, analyzing the argument that the court should adopt the selective waiver doctrine because the “culture” surrounding disclosures to government agencies is not voluntary.

21. See discussion *infra* Part IV.A–B.

22. See discussion *infra* in Parts II, III, and IV. Because the Rule discussed in this Article is proposed as a Federal Rule of Evidence, the cases cited throughout are from the federal courts. However, state decisions reflect similar differences in treatment with regard to issues involving inadvertent waiver and scope of waiver. See EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES*, § 6.12.4–.5, (Richard D. Friedman ed., 2002 & Supp. 2006); MCCORMICK ON EVIDENCE § 93 (John W. Strong ed., 5th ed. 1999).

23. Rules Enabling Act, Pub. L. No. 100-702, § 401, 102 Stat. 4648, 4648–49 (1988) (codified as amended at 28 U.S.C. § 2072 (2000)). Under the Rules Enabling Act, “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence” for the federal district courts. *Id.* § 2072(a).

During the debates in Congress on the adoption of what were then the Proposed Federal Rules of Evidence, many opponents of the privilege rules expressed concern that the issues inherent in the recognition or nonrecognition of privileges were ill-suited to the Court-initiated rulemaking process.²⁴ Ultimately, after enacting the Federal Rules of Evidence, Congress returned the primary evidence rulemaking function to the judiciary with regard to future additions, deletions and amendments,²⁵ except as to rules governing privilege.²⁶ Section 2074(b) provides that “[a]ny such rule creating, abolishing, or modifying an evidentiary privilege” must be “approved by [an] Act of Congress.”²⁷ Although one could argue that a rule governing waiver of privilege is not within the scope of § 2074(b), such an argument would be tenuous indeed. It is unlikely that the Judicial Conference of the United States, which is responsible for initiating the process under the Rules Enabling Act,²⁸ would interpret the limitation of § 2074 that narrowly. Therefore, if there is a change in the law of waiver of privilege in the federal courts, it is likely to come by way of congressional enactment rather than a rule adopted under the Rules Enabling Act. However, as in the case of Federal Rules of Evidence 413–415,²⁹ the congressional enactment could be in the form of an addition to the federal rules—most likely the Rules of Evidence.³⁰

Moreover, a congressionally adopted rule on waiver of privilege or work product protection would be of limited value to litigants if its effect were limited to federal proceedings. A decision by counsel made with regard to the limits of review of documents during discovery or as to the extent of disclosure in the course of a government agency investigation would not likely be affected by a rule that simply guarded against disclosure in later federal court litigation. An action in which waiver of privilege was asserted could well take place in a later state court

24. See, e.g., *Proposed Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 119 (1973) [hereinafter *House Hearings*] (statement of the Committee on Federal Courts, Association of the Bar of the City of New York) (“[C]ertain rules of evidence are of such a nature that their sole source should not be rules promulgated by the courts.”); *id.* at 160 (testimony of Charles R. Halpern and George T. Frampton, Jr. on behalf of the Washington Council of Lawyers) (criticizing the Proposed Rules of Evidence because they allow federal courts to abrogate state privileges); *id.* at 203–04 (testimony of George S. Leisure on behalf of the New York Trial Lawyers Committee) (raising constitutional concerns regarding the Proposed Rules of Evidence treatment of state privileges); *id.* at 263 (statement of Henry J. Friendly, C.J., United States Court of Appeals for the Second Circuit) (decrying the implementation of Federal Rules of Evidence because of the possibility of reviving pre-*Erie* forum shopping and using privileges as an example).

25. See 28 U.S.C. § 2073(a)(1) (2000).

26. *Id.* § 2074(b) (2000).

27. *Id.*

28. *Id.* § 2073.

29. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 320935(a), 108 Stat. 1796, 2135–37 (codified at FED. R. EVID. 413–415).

30. Because of the implication for both civil and criminal cases, the Federal Rules of Evidence are a more appropriate placement than either the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure.

proceeding. Unless a waiver rule is binding on state courts as well, it would have little effect on the conduct of parties in federal litigation.³¹

Thus, any federal legislation dealing with waiver of privilege would have to be applicable in both state and federal courts in order to be fully effective in dealing with the policy concerns in voluminous document and agency investigation cases. A problem that must be addressed is, of course, the congressional power to enact such legislation binding on the state courts.³²

This Article describes a Rule proposed by the Judicial Conference Advisory Committee on Evidence Rules³³ dealing with waiver of the attorney-client privilege and work product protection, and argues in favor of the enactment of such a rule by Congress. The Rule as proposed addresses the concerns of litigants in cases involving large numbers of documents³⁴ as well as the concerns of government agencies and the targets of their investigations³⁵ with regard to the possibility of broad waiver of the privilege. However, the Rule as proposed also responds to the very reasonable arguments that some care should be taken to review documents to be disclosed in discovery and that a document should not be used in a way that makes it unfair to claim privilege in connection with other related communications.³⁶

Part II of this Article describes the treatment of inadvertent waiver in the federal courts. Part III deals with the scope of waiver in the federal courts. Part IV covers selective waiver. Part V discusses the constitutional ability of Congress to enact a waiver rule binding on the states. Part VI sets out the Proposed Rule. Part VII discusses drafting decisions made in formulating the Proposed Rule. Part VIII concludes with a statement in favor of the Congressional adoption of what is proposed as Federal Rule of Evidence 502.

II. INADVERTENT WAIVER

Even a careful lawyer might overlook a privileged document produced in discovery with thousands of others. Although the disclosure of such a document may be intentional in the sense that the lawyer intends to hand over all documents in its group, it is unintentional in the sense that, if the lawyer had considered the privileged or protected nature of its contents, she would not have disclosed the

31. See discussion *infra* Parts V, VI.B.

32. See discussion *infra* Part V.

33. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES, FED. R. EVID. 502 (Proposed 2006), available at <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf> (last visited Nov. 10, 2006) [hereinafter JUDICIAL CONFERENCE REPORT] (containing the summary of the Committee's stance, the text of Proposed Federal Rule of Evidence 502, and the proposed committee notes).

34. See *id.* at FED R. EVID. 502 advisory committee's note (Proposed 2006).

35. See *id.* at FED R. EVID. 502(c) (Proposed 2006).

36. See *id.* at FED R. EVID. 502(a) (Proposed 2006).

document. The courts have generally referred to such an incident as an “inadvertent disclosure.”³⁷

Courts have taken three different approaches to inadvertent disclosure of documents during discovery: (1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; (2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; or (3) inadvertent disclosure may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.³⁸

Perhaps the fewest number of cases take the first approach, finding no waiver from any inadvertent disclosure. A leading case is *Mendenhall v. Barber-Greene Co.*,³⁹ where a lawyer simply produced all of his client’s files without determining whether they contained privileged matter.⁴⁰ The court stated the following:

Mendenhall’s lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the *client’s* welfare, we should require more than such negligence by *counsel* before the client can be deemed to have given up the privilege. No waiver will be found here.⁴¹

37. *E.g.*, *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 290 (D. Mass. 2000) (“[C]ourts . . . differ significantly with respect to the effect an inadvertent disclosure of privileged information has on the claim of privilege.”); *Berg Elecs., Inc. v. Molex, Inc.*, 875 F. Supp. 261, 263 (D. Del. 1995) (finding a party inadvertently disclosed documents because the party “did not intend to produce the[] documents.”); *Int’l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 446 (D. Mass. 1988) (discussing inadvertent disclosure).

38. When there is a waiver of privilege, questions of the scope of the waiver also exist. Some courts hold that an inadvertent waiver will waive the privilege with regard to only the document disclosed, not to other documents dealing with the same subject matter; others hold even an inadvertent waiver results in a subject matter waiver. *See* discussion *infra* Part III.

39. 531 F. Supp. 951 (N.D. Ill. 1982).

40. *See id.* at 952 & n.2.

41. *Id.* at 955 (citing *Dunn Chem. Co. v. Sybron Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,561, at 67,463 (S.D.N.Y. 1975)); *see also Berg Elecs., Inc.*, 875 F. Supp. at 263 (holding no waiver occurred because there was no intent to produce where documents were marked privileged and then inadvertently produced); *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955) (holding no waiver of privilege occurred because there was no evidence of intent to waive privilege). Texas has adopted a no waiver rule through amendments to its Rules of Civil Procedure:

(d) *Privilege Not Waived by Production.* A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

TEX. R. CIV. P. 193.3(d).

Despite its seeming ease of application, the no waiver approach has some distinct disadvantages. It encourages the parties to be sloppy in their production of documents—even in cases where the expense of careful production would not be great. A no waiver rule also raises the specter of a party engaging in the gamesmanship of “inadvertently” disclosing privileged information, demanding it back, and then arguing that a party has made improper use of the privileged information in its pleadings or arguments at trial.

A significant number of courts have taken the opposite approach. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.*⁴² In that case, one lawyer, assisted by three paralegals and thirteen of the client’s employees, reviewed 500,000 documents.⁴³ Privileged documents were sorted through the use of “post-its,” a system that obviously broke down somewhere along the way.⁴⁴ Twenty documents, totaling eighty-eight pages later claimed to be privileged, were in fact produced to the other side.⁴⁵ In reviewing the waiver of privilege issues with regard to the inadvertently produced documents, the court analyzed the three different approaches to inadvertent disclosure.⁴⁶ The court was particularly critical of an approach that analyzed the precautions taken, noting that “[i]f the precautions had been adequate, the disclosure would not have occurred.”⁴⁷ The court also stated the following: “When confidentiality is lost through ‘inadvertent’ disclosure, the Court should not look at the intention of the disclosing party. It follows that the Court should not examine the adequacy of the precautions taken to avoid ‘inadvertent’ disclosure either.”⁴⁸ The court added that “a strict rule . . . would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure.”⁴⁹

Among other cases, the court in *International Digital Systems*⁵⁰ relied upon *Underwater Storage, Inc. v. United States Rubber Co.*,⁵¹ where the *Underwater Storage* court stated the following:

The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its

42. 120 F.R.D. 445 (D. Mass. 1988).

43. *Id.* at 446.

44. *Id.* at 447–48.

45. *Id.* at 448.

46. *Id.* at 448–49.

47. *Id.* at 449.

48. *Id.* at 449–50 (citation omitted).

49. *Id.* at 450.

50. *Id.* at 448–49.

51. 314 F. Supp. 546 (D.D.C. 1970).

confidentiality was breached thereby destroying the basis for the continued existence of the privilege.⁵²

As in the case of the no waiver rule, the absolute waiver rule has its disadvantages. It may work an enormous hardship and financial burden on parties in cases involving a large volume of documents. The penalty for a mistake in such a case is multiplied many-fold where the court also finds a subject matter waiver based upon the inadvertent production of an insignificant document.⁵³

The third, or balanced approach, criticized by the court in *International Digital*, is taken by many recent decisions. Several decisions cite the factors for determining whether waiver occurs as a result of inadvertent disclosure, which were first set forth in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*:⁵⁴

What is at issue here is whether or not the release of the documents was a knowing waiver or simply a mistake, immediately recognized and rectified. The elements which go into that determination include the reasonableness of the precautions to prevent inadvertent disclosure, the time taken to rectify the error, the scope of the discovery and the extent of the disclosure. There is, of course, an overreaching issue of fairness and the protection of an appropriate privilege which, of course, must be judged against the care or negligence with which the privilege is guarded with care and diligence or negligence and indifference.⁵⁵

In *Lois Sportswear*, the defendant inadvertently disclosed some twenty-two privileged documents out of some thirty thousand its general counsel initially reviewed.⁵⁶ Considering the small number of privileged documents mistakenly produced, the court found, “[b]y a narrow margin,” that there was no waiver.⁵⁷

52. *Id.* at 549; accord *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D. Ill. 1996) (“With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position.”); *Ares-Serono, Inc. v. Organon Int’l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (finding the party’s inadvertent disclosure waived its trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B.*, 148 F.R.D. 456, 459–60 (D.D.C. 1992) (finding involuntary disclosure waived the attorney-client privilege and work product protection).

53. See discussion *infra* Part III.

54. 104 F.R.D. 103 (S.D.N.Y. 1985).

55. *Id.* at 105; see also *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985) (describing “(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the ‘overr[each]ing issue of fairness.’” (quoting *Lois Sportswear*, 104 F.R.D. at 105)).

56. 104 F.R.D. at 104.

57. *Id.* at 105. The court noted the following:

[O]nly 22 documents out of some 16,000 pages inspected and out of the 3,000 pages requested to be produced are now claimed to be privileged. Under these particular facts, the evidence is barely preponderate that the disclosure of the privileged documents was inadvertent and a mistake, rather than a knowing waiver.

Id. In contrast, the court in *Hartford Fire*, 109 F.R.D. at 332, found the plaintiff had waived the work

A persuasive analysis of the balanced approach, or “middle ground,” is contained in *Amgen Inc. v. Hoechst Marion Roussel, Inc.*,⁵⁸ a 2000 District of Massachusetts opinion written by Chief Judge William G. Young. The court in *Amgen* found a waiver of privilege, largely in light of the sheer magnitude of the disclosure—“approximately 200 documents comprising 3821 pages.”⁵⁹ In comparing its middle ground approach to the no waiver approach of cases like *Mendenhall* and the strict waiver applied in cases such as *International Digital Systems*, the *Amgen* court stated the following:

In particular, each of the two rigid alternatives fails to take highly relevant issues into account. The “never waived” approach, for example, creates little incentive for attorneys to guard privileged material closely and fails fully to recognize that even an inadvertent disclosure undermines the confidentiality which undergirds the privileges. Likewise, while the strict accountability rule certainly holds attorneys and clients accountable for their lack of care, it nonetheless diminishes the attorney-client relationship because, in rendering all inadvertent disclosures—no matter how slight or justifiable—waivers of the privileges, the rule further undermines the confidentiality of communications. . . . Providing a measure of flexibility, the “middle test” best incorporates each of these concerns and accounts for the errors that inevitably occur in modern, document-intensive litigation.⁶⁰

In the end, the *Amgen* court found the lawyer’s conduct in producing the privileged documents to be gross negligence and added the following: “In fact, if the Court does not hold that a waiver has occurred under the egregious circumstances here presented, it might as well adopt the ‘never waived’ rule and preclude such a holding in all cases.”⁶¹

product protection in light of the absence of reasonable precautions in reviewing “the small number of documents involved.” 109 F.R.D. at 330.

58. 190 F.R.D. 287 (D. Mass. 2000).

59. *Id.* at 293.

60. *Id.* at 292 (citations omitted).

61. *Id.* at 293. Other cases have also taken a similar balancing approach to inadvertent disclosure. See, e.g., *Allread v. City of Grenada*, 988 F.2d 1425, 1433–35 (5th Cir. 1993) (attorney-client privilege); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576–78 (D. Kan. 1997) (work product protection); *Edwards v. Whitaker*, 868 F. Supp. 226, 228–29 (M.D. Tenn. 1994) (attorney-client privilege); *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 636–37 (W.D.N.Y. 1993) (attorney-client privilege); see also Jennifer A. Hardgrove, Note, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U. ILL. L. REV. 643, 659 (discussing the five factors courts use when applying the “middle road” approach to attorney-client privilege); Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1348–55 (2001) (discussing the intermediate approach to waiver of the attorney-client privilege).

The middle ground or balanced approach would seem to eliminate the disadvantages of both the no waiver and absolute waiver rules. It is likely to reduce the costs of preproduction privilege review without tolerating sloppy lawyering and gamesmanship. But the persistent use by many judges of both the no waiver approach and the absolute waiver approach makes predicting the applicable rule uncertain at best.

III. SCOPE OF WAIVER

Under existing federal case law, a decision that an inadvertent disclosure results in waiver with respect to the disclosed document may also waive the privilege with regard to all communications dealing with the same subject matter. Similar to determining the effect of an inadvertent disclosure, courts have used various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications—even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*,⁶² the court found there had been a waiver of the attorney-client privilege based upon an inadvertent disclosure.⁶³ The court found that both the strict waiver approach and the balancing approach supported a finding of waiver.⁶⁴ However, the court limited the waiver to the actual document produced:

Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter.⁶⁵

Even in the leading case for the strict approach to inadvertent waiver, *International Digital Systems Corp. v. Digital Equipment Corp.*,⁶⁶ the court did not find subject matter waiver.⁶⁷

62. 132 F.R.D. 204 (N.D. Ind. 1990).

63. *Id.* at 209.

64. *Id.* at 208–09.

65. *Id.* at 208. Cases that held inadvertent disclosure results in subject matter waiver in fact existed at the time of *Golden Valley Microwave Foods*. See, e.g., *In re Sealed Case*, 877 F.2d 976, 980–81 (D.C. Cir. 1989) (finding inadvertent disclosure of one document waived the attorney-client privilege with regard to “all communications dealing with the same subject matter” (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982))).

66. 120 F.R.D. 445 (D. Mass. 1988).

67. See *id.* at 449–50 (finding inadvertent disclosure “operates as a waiver of the attorney-client privilege as to any documents disclosed by ‘inadvertence’” (emphasis added)).

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*,⁶⁸ the court used the balancing test to find waiver with regard to an inadvertent disclosure.⁶⁹ However, the court noted the following:

The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.⁷⁰

Despite the strong language in cases such as *Golden Valley*, other courts have in fact found subject matter waiver even where the disclosure was inadvertent. An important case from the District of Columbia Circuit that reached this result is *In re Sealed Case*.⁷¹ In that case, the court took a strict approach to inadvertent waiver, noting that “if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels.”⁷² The court went on to say that the waiver of the privilege extends “to all other communications relating to the same subject matter.”⁷³ Although the court noted that it would not disturb a district court’s decision in the absence of abuse of discretion, it remanded the case for clarification of the district court’s reasoning as to the dimensions of the scope of waiver.⁷⁴

Other courts have applied a subject matter waiver but have limited that waiver based upon the circumstances, often indicating a concern for fairness to both of the parties. For example, in *Hercules, Inc. v. Exxon Corp.*,⁷⁵ the court applied subject matter waiver but noted the following: “The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been

68. 116 F.R.D. 46 (M.D.N.C. 1987).

69. *Id.* at 50–52.

70. *Id.* at 52 (citation omitted).

71. 877 F.2d 976 (D.C. Cir. 1989).

72. *Id.* at 980.

73. *Id.* at 980–81 (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)); see also *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (holding inadvertent disclosure resulted in waiver of the attorney-client privilege with regard to the subject matter of the disclosure (quoting *United States v. Cote*, 456 F.2d 142, 145 (8th Cir. 1972))).

74. *In re Sealed Case*, 877 F.2d at 981. Numerous district court cases also provide for a broad subject matter waiver. *E.g.*, *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452, 453 (N.D. Ill. 1982) (“Plaintiffs secured no agreement from defendants that [inadvertent disclosure] would not waive privilege with respect to other documents.”); *Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177, 1179 (E.D. Pa. 1969) (finding an attempt to reserve the attorney-client privilege ineffective).

75. 434 F. Supp. 136 (D. Del. 1977).

disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter.”⁷⁶

The more reasoned holdings with regard to the scope of waiver emphasize the issue of fairness to the opposing party. Certainly, if the party making the disclosure uses the disclosed matter to its advantage in some way, then the opposing party should have the option of using other documents dealing with the same subject matter that may cast a different light on the issue.⁷⁷

The case law, especially the law involving the scope of waiver of work product privilege, is illustrative of these considerations. The most important case on waiver of work product privilege is *United States v. Nobles*.⁷⁸ In *Nobles*, the Court held that the defendant would waive his work product privilege by calling his investigator to testify about interviews with two prosecution witnesses.⁷⁹ The district court found that the investigator, if he testified, would have to disclose his report.⁸⁰ The defendant refused to turn over the report, and the district court precluded the investigator from testifying.⁸¹ The Supreme Court held that the preclusion was appropriate—if the investigator testified, the report would have to be disclosed.⁸² The testimony would waive the privilege “with respect to matters covered in his testimony.”⁸³ The effect of the *Nobles* Court’s ruling was that, not only was the work product protection waived with regard to matters directly reflected in the report, but also to all related matters—a subject matter waiver.⁸⁴

76. *Id.* at 156; *see also In re Grand Jury Proceedings* Oct. 12, 1995, 78 F.3d 251, 255–56 (6th Cir. 1996) (finding a party’s intentional non-litigation disclosure was waiver of subject matter of disclosures but scope of the waiver was limited under the circumstances); *In re Sealed Case*, 877 F.2d at 981 (holding a determination of the subject matter of waiver “depends heavily on the factual context in which the privilege is asserted”); *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981) (concluding subject matter waiver occurred, but because the disclosure was made “early in proceedings and . . . to opposing counsel rather than the court,” the subject matter of the waiver was limited to the “matter actually disclosed” and not related matters); *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 461–62 (N.D. Cal. 1978) (holding waiver limited to specific subject matter of conversation at a deposition); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286, 288–89 (N.D. Ill. 1976) (holding disclosure at the deposition was waiver limited to the specific matter disclosed at the deposition, rather than broader subject matter).

77. A claim of privilege where a party has used part, but not all, of the disclosed matter to its advantage is comparable to a party claiming the defense of advice of counsel and then relying on the attorney-client privilege to shield the remaining parts of its conversations with counsel. Courts have held the privilege is waived under such circumstances. *See, e.g., In re Grand Jury Subpoena*, 341 F.3d 331, 336–37 (4th Cir. 2003) (finding the party waived the attorney-client privilege with regard to the entire subject matter of the disclosure). *See also* FED. R. EVID. 106, which provides that when part of a writing is introduced, “an adverse party may require the introduction . . . of any other part” of the statement “which ought in fairness to be considered contemporaneously with it.”

78. 422 U.S. 225 (1975).

79. *Id.* at 239.

80. *See id.* at 228.

81. *See id.* at 229.

82. *See id.* at 239–40.

83. *Id.* at 239.

84. *See Chubb Integrated Sys. Ltd. v. Nat’l Bank of Wash.*, 103 F.R.D. 52, 63–64 n.3 (D.D.C. 1984) (citing *Nobles* for the proposition that “the testimonial use of work-product constituted waiver of all work-product of the same subject matter”).

More recent cases from the courts of appeal and district courts reflect a view that subject matter waiver may be more limited than suggested in *Nobles*, and that the limitation will depend upon consideration of fairness under the circumstances. Reflective of that view is the Second Circuit case of *United States v. Doe*.⁸⁵ In *Doe*, a corporation had asserted attorney-client and work product privileges in its dealing with an ATF investigation concerning sales of firearms.⁸⁶ A corporate officer testified and made references to advice of counsel.⁸⁷ The primary question was whether his references to advice of counsel and disclosure of communications with counsel waived the corporation's attorney-client and work product privileges.⁸⁸ The Second Circuit noted that "the implied waiver analysis should be guided primarily by fairness principles."⁸⁹ The court indicated that the district court, in determining the existence and scope of waiver as a result of the corporate officer's disclosures, should consider things such as the witness's lack of legal training and the fact that the disclosures were made before the grand jury,⁹⁰ where the corporation could gain no benefit.⁹¹ Specifically with regard to waiver of work product privilege, the court stated, "[W]e believe that the district court on remand should consider further whether there was any waiver of Doe Corp.'s work-product privilege, and, if there was, the proper scope of the waiver. The fairness concerns that guide the waiver analysis above are equally compelling in this context."⁹² The court distinguished cases finding subject matter waiver: "In this case, however, there was no actual disclosure of any privileged documents. Further, the context—a grand jury proceeding—is, as already indicated, quite different from settlement negotiations or voluntary disclosure programs where the company, initially at least, stands to benefit directly from disclosing privileged materials."⁹³

In *Duplan Corp. v. Deering Milliken, Inc.*,⁹⁴ the Fourth Circuit held that there was no subject matter waiver of work product protection under the circumstances.⁹⁵ In *Duplan*, the parties seeking protection made partial and inadvertent waiver of some of the claimed protected documents, which consisted of "mental impressions, opinions, and legal theories of [their] attorneys and representatives."⁹⁶ In refusing to find subject matter waiver, the court distinguished *Nobles* on two grounds. First, in *Nobles*, the work product was a witness's report, not the mental impressions of a lawyer.⁹⁷ Second, the court noted that the party seeking protection had "neither made nor sought to make any affirmative testimonial use of the documents for

85. 219 F.3d 175 (2d Cir. 2000).

86. *Id.* at 179–180.

87. *Id.* at 180.

88. *Id.* at 179.

89. *Id.* at 185.

90. *Id.* at 186–87.

91. *Id.* at 191.

92. *Id.* at 191.

93. *Id.*

94. 540 F.2d 1215 (4th Cir. 1976).

95. *Id.* at 1223.

96. *Id.*

97. *Id.*

which the [party seeking production] claim[s] the work product immunity has been waived.”⁹⁸ The court also noted that the principles of *Nobles* may be applicable if the documents were in fact used at trial.⁹⁹

The Fourth Circuit expanded its reasoning in *Duplan* in *United States v. Pollard*.¹⁰⁰ In *Pollard*, the defendant in a criminal case sought documents from Martin Marietta, his former employer, relating to matters for which the defendant had been indicted.¹⁰¹ Martin Marietta claimed attorney-client and work product privileges.¹⁰² Defendant argued that Martin Marietta impliedly waived the privilege because documents, or some portions of them, had been disclosed by the corporation to the U.S. Attorney and the Department of Defense.¹⁰³ The court found a subject matter waiver of the attorney client privilege based upon the disclosure to the government.¹⁰⁴ With regard to the work product privilege, the court held that the delivery to the government constituted a testimonial use of the documents,¹⁰⁵ as in *Nobles*, and held Martin Marietta’s disclosure was a subject matter waiver of non-opinion work product.¹⁰⁶ However, the court held that there was no subject matter waiver of opinion work product.¹⁰⁷ The court emphasized the added protection given to such work product:

[T]he underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in *Nobles*: where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure. There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as a shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.¹⁰⁸

98. *Id.*

99. *Id.*

100. 856 F.2d 619, 625–26 (4th Cir. 1988).

101. *Id.* at 620.

102. *Id.* at 622.

103. *Id.*

104. *Id.* at 623–24.

105. *Id.* at 625.

106. *Id.*

107. *Id.* at 625–26.

108. *Id.* at 626 (citation omitted) (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1223 (4th Cir. 1976)).

By analogy, cases involving the privilege against self-incrimination also point out the possibility of distortion of facts if an individual were to waive the privilege with regard to some matters, but claim it as to others.¹⁰⁹

In an important 1986 article, Professor Richard Marcus surveyed, in great depth, the cases dealing with scope of waiver up to that point in time.¹¹⁰ Marcus argued that subject matter waiver should be analyzed in terms of fairness, stating, “[T]he focus should be on the unfairness that results from the privilege-holder’s affirmative act misusing the privilege in some way.”¹¹¹ He also noted the importance of not garbling the truth:

This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight.

... Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.¹¹²

Thus, although courts have different views with regard to scope of waiver, there is authority, both in case law and in scholarly writing, for the position that the scope of waiver should be governed by considerations of fairness. Subject matter waiver makes sense where production of previously disclosed material is necessary to protect an adversary from a misleading presentation of the evidence; it is unnecessarily punitive in other instances. But as important as it is to adopt a fair rule, it is equally important to have a predictable, uniform rule. Providing uniformity in this area of the law would be a worthwhile pursuit.

IV. SELECTIVE WAIVER

Only the Eighth Circuit and district courts in other circuits have held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency.¹¹³ The First, Third, Fourth, Sixth, Tenth, and District of Columbia Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney-client privilege

109. See, e.g., *Rogers v. United States*, 340 U.S. 367, 371 (1951) (finding a witness could not testify that she turned over records to another person and then refuse to identify that person).

110. Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986).

111. *Id.* at 1627.

112. *Id.* at 1607–08.

113. See *infra* Part IV.A.

is lost.¹¹⁴ The Third, Sixth and Tenth Circuits have held that disclosure destroys the attorney-client privilege, even in the presence of a confidentiality agreement with the federal agency.¹¹⁵ Other courts have suggested that a selective waiver may apply if the client has clearly communicated her intent to retain the privilege, such as by entering into a confidentiality agreement.¹¹⁶

A. Cases Permitting Selective Waiver

The court in *Diversified Industries, Inc. v. Meredith*¹¹⁷ adopted a selective waiver approach.¹¹⁸ Diversified Industries had conducted an internal investigation over a possible “slush fund” that may have been used to bribe purchasing agents of other corporations to buy its product.¹¹⁹ The SEC instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified’s internal investigation.¹²⁰ Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC’s request.¹²¹ Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal.¹²² The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the attorney-client privilege was waived when Diversified voluntarily disclosed the privileged material to the SEC.¹²³ The Eighth Circuit rejected this argument, holding that because the documents were disclosed “in a separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred.”¹²⁴ The court explained, “To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them.”¹²⁵

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979*,¹²⁶ a Wisconsin District Court held that cooperation with federal agencies should be encouraged and therefore refused to treat disclosure of

114. See Part IV.B-C.

115. See Part IV.C.

116. See *infra* Part IV.D. For a survey of the law governing selective waiver, see Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 39-59 (1997). See also Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 734-54 (2006) (discussing courts’ different approaches to selective waiver).

117. 572 F.2d 596 (8th Cir. 1977).

118. See *id.* at 611.

119. See *id.* at 600.

120. *Id.* at 599.

121. See *id.*

122. *Id.* at 600.

123. *Id.* at 599.

124. *Id.* at 611.

125. *Id.*

126. 478 F. Supp. 368 (E.D. Wis. 1979).

privileged information to the SEC as a waiver of the corporation's attorney-client privilege.¹²⁷

B. General Rejection of Selective Waiver

In *United States v. Massachusetts Institute of Technology*,¹²⁸ the First Circuit held that the attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense (DOD).¹²⁹ MIT had voluntarily disclosed documents to the DOD pursuant to a regular audit.¹³⁰ The same documents were sought as part of an Internal Revenue Service investigation.¹³¹ In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because "agencies usually have means to secure the information they need and, if not, can seek legislation from Congress."¹³² The court added that applying the general principle of waiver of privilege to any third party disclosure "makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty."¹³³

In the District of Columbia Circuit case of *Permian Corp. v. United States*,¹³⁴ Occidental, (Permian's parent corporation) sought attorney-client protection for documents sought by the Department of Energy.¹³⁵ Occidental had previously disclosed the documents to the SEC.¹³⁶ The court rejected the *Diversified* approach and held that the privilege had been waived by the disclosure to the SEC.¹³⁷ The court stated, "Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship."¹³⁸ The court added,

The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has

127. *Id.* at 372–73. See also *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. *Id.* at 605. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents." *Id.*

128. 129 F.3d 681 (1st Cir. 1997).

129. *Id.* at 686.

130. See *id.* at 683.

131. *Id.*

132. *Id.* at 685.

133. *Id.*

134. 665 F.2d 1214 (D.C. Cir. 1981).

135. See *id.* at 1215–17.

136. *Id.* at 1216.

137. *Id.* at 1220–22.

138. *Id.* at 1221.

already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment.¹³⁹

The Fourth Circuit's decision in *United States v. Pollard*¹⁴⁰ rejected selective waiver of the attorney-client privilege where the privilege holder had previously disclosed information in settling a criminal matter and in a DOD investigation.¹⁴¹ As noted earlier, the court also found a waiver of non-opinion work product protection but no subject matter waiver for opinion work product.¹⁴²

C. *Rejection of Selective Waiver even with a Confidentiality Agreement*

Three prominent cases, from the Third, Sixth, and, very recently, the Tenth Circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In the Third Circuit case of *Westinghouse Electric Corp. v. Republic of the Philippines*,¹⁴³ Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice (DOJ) in connection with investigations concerning the bribing of foreign officials.¹⁴⁴ Westinghouse said that its disclosures to the SEC were made in reliance upon SEC regulations, which provided that "information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized."¹⁴⁵ The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse's attorney-client and work product privileges.¹⁴⁶ The Republic of the Philippines brought suit against Westinghouse alleging that Westinghouse bribed a "henchman" of former Philippine President Marcos to obtain a power plant contract.¹⁴⁷ The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies.¹⁴⁸ The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ.¹⁴⁹ The court noted the following:

139. *Id.* (citations omitted).

140. 856 F.2d 619 (4th Cir. 1988).

141. *Id.* at 623–24.

142. *Id.* at 624–26; *see supra* notes 102–10 and accompanying text. Another Fourth Circuit case is *In re Weiss*, 596 F.2d 1185 (4th Cir. 1979), where the court, distinguishing *Diversified* as involving private litigation, held that a lawyer's testimony before the SEC constituted a waiver of the attorney-client privilege as to future testimony before a grand jury. *Id.* at 1186.

143. 951 F.2d 1414 (3d Cir. 1991).

144. *Id.* at 1417.

145. *Id.* at 1418 & n.4 (citing 17 C.F.R. § 240.0-4 (1978)).

146. *Id.* at 1419.

147. *Id.* at 1417.

148. *Id.*

149. *Id.* at 1418.

[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in *Diversified*.

The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto the attorney-client privilege. Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies. We agree with the D.C. Circuit that these objectives, however laudable, are beyond the intended purposes of the attorney-client privilege, . . . and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.¹⁵⁰

The court also noted that "[i]n 1984, Congress rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency."¹⁵¹

Relevant to the question of scope of waiver, the court in *Westinghouse* also noted the following:

[T]he privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary. . . . If partial waiver does disadvantage the disclosing party's adversary by . . . allowing the disclosing party

150. *Id.* at 1425 (citations omitted).

151. *Id.* (citing *Statement of the Securities and Exchange Commission in Support of a Proposed Amendment to Section 24 of the Securities Exchange Act of 1934 to Exempt Certain Records from Disclosure Under the Freedom of Information Act*, 16 Sec. Reg. & L. Rep. (BNA) 456, 461 (Mar. 2, 1984). The SEC proposed, but did not adopt, a similar regulation in connection with the Sarbanes-Oxley Act. See *infra* notes 204–06 and accompanying text.

to present a one-sided story to the court, the privilege will be waived as to all communications on the same subject.¹⁵²

The court in *Westinghouse* distinguished between the attorney-client and work product privileges and stated that a disclosure to another party might not necessarily operate as a waiver of the work product privilege.¹⁵³ Disclosures in aid of an attorney's preparation for litigation would still be protected.¹⁵⁴ However, the court found that disclosure to the federal agencies in this instance operated as a waiver because the disclosures "were not made to further the goal underlying the [work-product] doctrine"¹⁵⁵—the protection of the adversary process.¹⁵⁶

The Sixth Circuit, in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*,¹⁵⁷ also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement.¹⁵⁸ In that case, the DOJ had conducted an investigation of possible Medicare and Medicaid fraud.¹⁵⁹ Columbia/HCA had disclosed documents to the DOJ under an agreement with "stringent" confidentiality provisions.¹⁶⁰ Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals.¹⁶¹ These plaintiffs sought discovery of the materials disclosed to the DOJ.¹⁶² Columbia/HCA raised attorney-client and work product privilege objections.¹⁶³ The court expressly rejected the application of selective waiver for either privilege under these circumstances.¹⁶⁴ In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was "not a creature of contract, arranged between parties to suit the whim of the moment."¹⁶⁵ The court further reasoned that allowing federal agencies to enter into confidentiality agreements would allow those agencies to "assist in obfuscating the 'truth-finding process.'"¹⁶⁶

There was a strong dissent in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation* by Judge Boggs, who argued for a selective waiver rule.¹⁶⁷ He stated that "[a]s the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail."¹⁶⁸ He

152. *Westinghouse*, 951 F.2d at 1426 n.12 (citation omitted).

153. *Id.* at 1428.

154. *See id.*

155. *Id.* at 1429.

156. *Id.* at 1428.

157. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002).

158. *Id.* at 293, 307.

159. *Id.* at 291.

160. *Id.* at 292.

161. *Id.*

162. *Id.* at 293.

163. *Id.*

164. *Id.* at 302, 307.

165. *Id.* at 303.

166. *Id.*

167. *Id.* at 307 (Boggs, J., dissenting).

168. *Id.* at 311.

added, “Faced with a waiver of the attorney-client privilege over the entire subject matter of a disclosure and *as to all persons*, the holder of privileged information would be more reluctant to disclose privileged information voluntarily to the government than if there were no waiver associated with the disclosure.”¹⁶⁹

In 2006, *In re Qwest Communications International, Inc. Securities Litigation*¹⁷⁰ fell in line with *Westinghouse* and *In re Columbia/HCA Healthcare Corp.* by refusing to adopt selective waiver despite the existence of a confidentiality agreement.¹⁷¹ In *Qwest*, the company had produced some “220,000 pages of documents protected by the attorney-client privilege and work-product doctrine to the SEC and the DOJ (the Waiver Documents).”¹⁷² *Qwest* disclosed the documents to the government under an agreement that provided for confidentiality as to third parties but also provided that either agency could disclose the documents in furtherance of its “discharge of its duties and responsibilities.”¹⁷³ The agreement with the DOJ specifically stated “that the DOJ could share the [Waiver Documents] with other state, local, and federal agencies, and that it could ‘make direct or derivative use of the [Waiver Documents] in any proceeding and its investigation.’”¹⁷⁴ Before and after those investigations began, private parties filed suit against *Qwest* in cases raising many of the same issues as those involved in the government investigations.¹⁷⁵ *Qwest* sought to protect the documents produced for the government agencies against discovery by the private parties.¹⁷⁶

The court held *Qwest* waived the attorney-client privilege and non-opinion work product protection by disclosing the documents to the government agencies.¹⁷⁷ After a thorough review of the existing case law in both federal¹⁷⁸ and state¹⁷⁹ courts, the *Qwest* court reached the conclusion that “the record in this case is not sufficient to justify adoption of a selective waiver doctrine as an exception to the general rules of waiver upon disclosure of protected material.”¹⁸⁰ Specifically, the court found that the record did not support the contention that companies will cease cooperating with law enforcement absent protection under the selective waiver

169. *Id.* at 309–10. For further discussion of Judge Boggs’s dissent, see *infra* notes 209–12 and accompanying text.

170. 450 F.3d 1179 (10th Cir. 2006) *cert denied sub nom.*, *Qwest Commc’ns Int’l Inc. v. New England Health Care Employees Pension Fund*, No. 06-343, 2006 U.S. LEXIS 8627 (U.S. Nov. 13, 2006).

171. *Id.* at 1181.

172. *Id.*

173. *Id.*

174. *Id.* (citation omitted).

175. *Id.* at 1182.

176. *Id.*

177. See *id.* at 1181, 1182.

178. *Id.* at 1186–92.

179. *Id.* at 1196–97. Specifically, the court cited *McKesson Corp. v. Green*, 610 S.E.2d 54, 56 (Ga. 2005), and *McKesson HBOC, Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812, 819, 821 (Ct. App. 2004), as examples of state courts rejecting selective waiver with respect to work product protection, despite the existence of confidentiality agreements. *Qwest*, 450 F.3d at 1196.

180. *Id.* at 1192.

doctrine.¹⁸¹ After all, 220,000 pages of documents were produced in this case “in the face of almost unanimous circuit-court rejection of selective waiver in similar circumstances.”¹⁸² The court found little support for Qwest’s arguments based upon the broad terms of the confidentiality agreements.¹⁸³ The agreements gave such broad discretion to the agencies that the court concluded it was “not inappropriate to conclude that some undetermined number of Waiver Documents ha[d] been widely disseminated and ha[d] thus become public information.”¹⁸⁴ The court found no basis to conclude that selective waiver would promote an exchange between attorney and client:

If officers and employees know their employer could disclose privileged information to the government without risking a further waiver of the attorney-client privilege, they may well choose not to engage the attorney or do so guardedly. Such reticence and caution could be heightened where, as here, further disclosures by the government mean that the information may be disclosed to countless others.¹⁸⁵

Finding no basis for selective waiver in the policies underlying the attorney-client privilege, the court likened the doctrine of selective waiver to the creation of a new privilege for materials surrendered in a government investigation.¹⁸⁶ The court found insufficient state support for the creation of such a privilege,¹⁸⁷ unlike the substantial state precedent for the creation of a psychotherapist-patient privilege in *Jaffee v. Redmond*.¹⁸⁸ The court also found no basis for creating a new privilege to guard against what the amici curiae (Association of Corporate Counsel and Chamber of Commerce of the United States of America) called a “culture of waiver” established by federal prosecutors.¹⁸⁹ The amici argued that companies facing federal investigations are coerced into waiving their privileges because of the risk of “being labeled as uncooperative” by the federal officials.¹⁹⁰ The court found the record insufficient, both generally and in this instance, to justify action by the court to seek to reverse the “culture” argued to exist by the amici.¹⁹¹

181. *Id.*

182. *Id.* at 1193.

183. *Id.* at 1194.

184. *Id.* at 1194.

185. *Id.* at 1195.

186. *Id.* at 1197–99.

187. *Id.* at 1197.

188. 518 U.S. 1, 10–15 (1996).

189. *Qwest*, 450 F.3d at 1199.

190. *Id.*

191. *Id.* Interestingly, corporate counsel argued before the Federal Rules of Evidence Advisory Committee that the same culture of waiver should cause the Committee to reject a selective waiver rule because such a rule would put further pressure on companies to waive their privilege in government investigations. See *supra* note 20 and accompanying text.

Despite the court's clear and strong rejection of selective waiver in *Qwest*, the opinion does not dismiss the possibility of a selective waiver rule created by rule or statute. The premise of the court's decision was that the record was insufficient to support the application of such a rule in this case.¹⁹² But it added the following:

Whether a rule-making or legislative venue is appropriate to address the issues raised by *Qwest* and amici is a question for the Standing Committee and Congress. The rule-making and legislative processes, however, need not proceed wholly independent of the common law. The accumulated experience of federal common law in the area of attorney-client privilege and work-product protection is but another source for the legislative and rule-making bodies to draw on to inform their deliberations concerning the need for and parameters of selective waiver or a new privilege.¹⁹³

D. Recognition of Selective Waiver Where a Confidentiality Agreement Exists

A few courts have indicated they would recognize selective waiver where the disclosing party expressly reserves confidentiality before disclosure. The leading decision taking this position, *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*,¹⁹⁴ is from the Southern District of New York. The court held that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency "only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed."¹⁹⁵ The court noted,

[A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a

192. *Qwest*, 450 F.3d at 1192.

193. *Id.* at 1201. The Standing Committee reference is to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to which the Advisory Committee reports. *Id.* at 1200.

The court noted, in connection with its discussion of attempts to deal with the culture of waiver issue raised by the amici, that Proposed Rule 502 had been published by the Advisory Committee on Evidence Rules and would be submitted to the Standing Committee. *Id.* The Standing Committee approved the publication of the Rule for public comment at its June 22–23, 2006 meeting. See Federal Rulemaking, <http://www.uscourts.gov/rules/index.html#standing0606> (last visited Nov. 13, 2006); *infra* Part VI.

194. 521 F. Supp. 638 (S.D.N.Y. 1981).

195. *Id.* at 646.

knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.¹⁹⁶

The Second Circuit, in *In re Steinhardt Partners, L.P.*,¹⁹⁷ rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC which would otherwise have been protected as work product.¹⁹⁸ However, after so holding, the court stated,

In denying the petition, we decline to adopt a *per se* rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.¹⁹⁹

E. The Possibility of a Rule Providing for Selective Waiver

The weight of authority is clearly against recognition of selective waiver. However, policy considerations in favor of selective waiver may be strong enough for Congress to accomplish by rule what the courts have been unwilling to do on a case-by-case basis.²⁰⁰ In the recent *Qwest* decision, the Tenth Circuit, although firmly rejecting judicial adoption of selective waiver, conceded that a rule-making or legislative body might well come to a different conclusion.²⁰¹

As the court in *Westinghouse Electric Corp.* noted, in 1984 Congress rejected an amendment proposed by the SEC to the Securities and Exchange Act of 1934

196. *Id.*

197. 9 F.3d 230 (2d Cir. 1993).

198. *Id.* at 236.

199. *Id.* (citation omitted); see also *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (citing *In re Horowitz*, 482 F.2d 72, 81–82 (2d Cir. 1983); *Eglin Fed. Credit Union v. Cantor, Fitzgerald Sec. Corp.*, 91 F.R.D. 414, 418–19 (N.D. Ga. 1981)) (finding that a claim of law enforcement privilege could have been maintained after the government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1375 (D.C. Cir. 1984) (indicating that a company could “insist on a promise of confidentiality before disclosure to the SEC”); *In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982) (rejecting selective waiver but noting that the record did not indicate the existence of a confidentiality agreement); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696–97 (D. Colo. 1993) (holding that prior disclosure to the U.S. Attorney under a confidentiality agreement did not waive the privilege against a private party); *Fox v. Cal. Sierra Fin. Servs.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) (following *Teachers Insurance*, the court held the privilege was lost when the party disclosed information “without steps to protect the privileged nature of such information”).

200. See *In re Subpoenas Duces Tecum*, 738 F.2d at 1375.

201. *In re Qwest Commc'ns Int'l Inc.*, Sec. Litig., 450 F.3d 1179, 1201 (10th Cir. 2006), *cert denied sub nom.*, *Qwest Commc'ns Int'l Inc. v. New England Health Care Employees Pension Fund*, No. 06-343, 2006 U.S. LEXIS 8627 (U.S. Nov. 13, 2006); see *supra* text accompanying notes 192–93.

establishing a selective waiver rule.²⁰² A regulation to the same effect was proposed, but not adopted, in connection with the Sarbanes-Oxley Act.²⁰³ The SEC indicated that the regulation, although included in the final draft of the regulations implementing Sarbanes-Oxley, was not adopted because of the SEC's concern about its authority to enact it.²⁰⁴ In its final report, the SEC reiterated its position that there were strong policy reasons behind such a provision, and for those reasons, it still intended to enter into confidentiality agreements.²⁰⁵

The policy reasons behind the SEC's proposed regulation seem obvious. The availability of selective waiver would encourage targets of its investigation to cooperate more fully with the agency.²⁰⁶ The same encouragement would exist with regard to any agency investigation.²⁰⁷ Not only would selective waiver benefit the agency, it would relieve the target companies, which could comply fully with agency requests without the fear that their privileged documents would be used in private litigation.²⁰⁸ Private parties would be in no worse of a position than they would have been if the target had not cooperated with the government agency.

Dissenting in *In re Columbia/HCA Healthcare Corp.*,²⁰⁹ Judge Boggs argued that there should be a government investigation exception to the third-party waiver rule.²¹⁰ He based his argument on the "increased access to privileged information" that such an exception would provide.²¹¹ He added,

[T]he choice presented in this case is not one whether or not to release privileged information to private parties that has already been disclosed to the government, but rather one to create incentives that permit voluntary disclosures to the government at all. In the run of cases, either the government gets the disclosure made palatable because of the exception, or neither the government nor any private party becomes privy to the privileged material.²¹²

202. *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); see *supra* text accompanying note 151.

203. Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (proposed Feb. 6, 2003), available at <http://www.sec.gov/rules/final/33-8185.htm>.

204. *Id.*

205. *Id.* at 6312-13.

206. See *id.*

207. See *id.*

208. See *id.*

209. 293 F.3d 289 (6th Cir. 2002).

210. *Id.* at 308 (Boggs, J., dissenting); see *supra* text accompanying notes 167-69.

211. *Id.* at 311.

212. *Id.* at 312.

The SEC's fears that it would lack the power to adopt a selective waiver provision are not present if Congress adopts such a provision.²¹³ For reasons discussed below, a congressionally adopted rule providing for selective waiver would likely be constitutional.²¹⁴

V. BINDING THE STATES TO FEDERAL COURT RULES GOVERNING WAIVER OF PRIVILEGE

If a statute or rule governing inadvertent waiver, scope of waiver, and selective waiver of an evidentiary privilege is to effectively eliminate the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, then the provision must be binding on all persons, whether or not they are parties to the litigation in which the disclosure takes place, and in all courts, state and federal.²¹⁵

In order to be binding in both federal and state courts, the rule would have to be enacted by Congress. Through the Rules Enabling Act, Congress has taken from the courts the power to adopt rules dealing with privilege.²¹⁶ A rule governing the effect of the disclosure of a document during discovery, in the course of federal litigation, could very likely bind all parties and courts under Congress's power to legislate in aid of the federal courts under Article III of the Constitution. A rule going beyond governing discovery and dictating the effect of disclosure to a federal agency on parties not before the agency, as well as governing state treatment of disclosure, would have to depend upon Congress's Article I commerce clause powers.

A. *The Constitutionality of a Congressionally Adopted Rule Governing the Effect of Disclosure of Privileged Matters in the Course of Federal Litigation*

1. *Power to Bind the States in the Absence of a Rule*

Even without a rule, a federal court probably has the power to bind state courts with regard to waiver or nonwaiver of an evidentiary privilege, but the issue is not entirely clear. There is no question that a federal court has the power to limit the use of information obtained in discovery. Protective orders, especially those involving trade secrets, abound and are universally upheld.²¹⁷

213. Indeed, Congress subsequently enacted a selective waiver provision for disclosures to banking regulators. *See* Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 607, 120 Stat. 1966, 1981 (2006), PL 109-351 (Westlaw).

214. *See infra* Part V.B.

215. *See infra* Part VII.B.1.

216. 28 U.S.C. § 2074(b) (2000); *see supra* text accompanying notes 23–29.

217. *See* E.I. Du Pont De Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917); Chem. & Indus. Corp. v. Druffel, 301 F.2d 126, 130 (6th Cir. 1962); 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2043 (1994 & Supp. 2006).

However, limiting the use of documents or even information obtained in discovery is different from ruling that disclosures or other actions taken in federal court do or do not constitute a waiver of state evidentiary privileges. The most significant case dealing with this issue is *Bittaker v. Woodford*.²¹⁸ *Bittaker* is an en banc decision of the Ninth Circuit involving the scope of a habeas petitioner's waiver of the attorney-client privilege.²¹⁹ The district court held that the petitioner waived the attorney-client privilege by filing a claim based on ineffective assistance of counsel.²²⁰ The district court, however, entered a protective order precluding use of the privileged materials for any purpose other than litigating the federal habeas petition, including barring the state from use of the information in a re-prosecution.²²¹ The state appealed, claiming that the court had no authority to prevent a state court from dealing with the issue of waiver of privilege under state privilege rules.²²² A majority of the en banc court, in an opinion written by Judge Kozinski, found that the district court's order effectively determined there would be no waiver of the privilege in a subsequent state trial.²²³ The court held that the district court had the power to determine the limits of the waiver and to make that determination binding on the state courts.²²⁴ The opinion noted that a waiver limiting the use of privileged communications to adjudication of the ineffective assistance of counsel claim fully serves federal interests and preserves "the state's vital interest in safeguarding the attorney-client privilege in criminal cases."²²⁵ The court further noted that "[t]he courts of California remain free, of course, to determine whether Bittaker waived his attorney-client privilege on some basis *other than* his disclosure of privileged information during the course of the federal litigation."²²⁶

On one level, Judge Kozinski's opinion is compelling from a policy standpoint. Limiting the use of information covered by the attorney-client privilege to the ineffective assistance of counsel issue appropriately limits the waiver to the scope that is necessary to resolve the petitioner's claim. Arguably, the petitioner would pay too high a price for his attack on the prosecution if the state was permitted to use the information in a re-prosecution. Yet, the two concurring judges also make a valid point regarding the power of the federal courts to deal with waiver of privilege in a statute or rule such as the one proposed in this Article. Judges O'Scannlain and Rawlinson concurred in *Bittaker* on the basis that the district judge's order should not have been interpreted as dealing with the scope of the privilege under state law.²²⁷ Rather, the order should have been interpreted as

218. 331 F.3d 715 (9th Cir. 2003) (en banc).

219. *Id.* at 716–17.

220. *Id.* at 717.

221. *Id.*

222. *Id.* at 717, 725.

223. *Id.* at 727.

224. *Id.* at 726.

225. *Id.* at 722.

226. *Id.* at 726.

227. *Id.* at 728 (O'Scannlain, J., concurring).

preventing the use of information obtained in the federal litigation, but not preventing the state from using the same information obtained from another source if California law would so permit.²²⁸ The privilege law of California would govern in any re-prosecution of the defendant; thus, the courts of that state should be free to determine whether or not the privilege had been waived.²²⁹ The concurring judges argued that the federal courts have a right to limit the use of information obtained in connection with its litigation—as in trade secrets cases—but no power to determine the application of a state privilege in the state courts.²³⁰

At least one lower court has refused to issue an order having the effect that the majority in *Bittaker* prescribed. In *Fears v. Warden*,²³¹ the court, rejecting the reasoning of the majority in *Bittaker*, ordered only that the state was bound to keep the information obtained confidential and declined to decide the issue of waiver of privilege in a subsequent state court proceeding.²³²

Even though it is not a controlling precedent, *Bittaker* is useful in framing the issues. Although, as the court notes, the case involves a waiver by implication rather than an intentional or inadvertent disclosure of a privileged document,²³³ the case presents the issue of a federal court's power, at least in the absence of a congressionally enacted rule, to affect the future application of a state court privilege. As the divided opinion in *Bittaker* graphically illustrates, the extent of this power is not entirely clear.

2. *The Power to Enact a Rule Dealing with Disclosure During Federal Court Litigation*

Although doubt exists regarding an individual court's power to issue an order affecting subsequent state court proceedings, it does not necessarily mean a rule or statute may not confer such a power. Arguably, an issue such as that raised in *Bittaker* may arise from the absence of a common law rule conferring authority on a court to make such orders binding on the state courts—an absence that the adoption of a rule or statute governing the issue might correct.²³⁴

A rule governing the effect on evidentiary privilege of disclosure of a document in the course of federal court litigation would almost certainly survive an attack on its constitutionality. Congress has broad powers to legislate in aid of the federal courts, whether it does so through the Rules Enabling Act process or independently. Congress's power stems from Article III, Section One and Article I, Section Eight, Clause Nine of the Constitution, giving it power to establish lower tribunals, as well

228. *Id.* at 733–34.

229. *Id.* at 732–33.

230. *Id.* at 735.

231. No. C-1-01-183, 2003 WL 23770605 (S.D. Ohio Aug. 9, 2003).

232. *Id.* at *4.

233. See *Bittaker*, 331 F.3d at 719–20.

234. Congress can adopt a rule without going through the Rules Enabling Act, 28 U.S.C. § 2072(b) (2000). Federal Rules of Evidence 413–415 were adopted in exactly that manner. See *supra* text accompanying notes 23–30.

as the Necessary and Proper Clause of Article I, Section Eight, Clause Eighteen. The broad power of Congress to describe and regulate modes of proceeding was established early in our constitutional history.²³⁵

It is unlikely that a rule limited to disclosures made in the course of federal litigation would be held invalid. *Hanna v. Plumer*²³⁶ established that the Congress's power delegated under the Rules Enabling Act extends to matters "falling within the uncertain area between substance and procedure, [but that] are rationally capable of classification as either."²³⁷ The Court has never found a rule invalid for impermissibly affecting a substantive right.²³⁸ Although one may question whether rules governing evidentiary privileges are procedural or substantive, even writers who objected to the enactment of the proposed Federal Rules of Evidence governing privilege assumed the power of Congress to enact such rules and argued against their adoption on policy grounds.²³⁹

The ability of the Rules to dictate state court action has been clearly established. For example, a federal court determination of the preclusive effect of a judgment controls state action with regard to that judgment.²⁴⁰ Furthermore, the federal supremacy principle has been applied to state procedural rules where federal substantive law is preemptive.²⁴¹

235. *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 655–56 (1835); see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 4–6 (1825). In addition, Justice Reed's dissent in *Erie R.R. v. Tompkins* is often quoted for this proposition. 304 U.S. 64, 92 (1938) (Reed, J., dissenting) ("[N]o one doubts federal power over procedure." (citing *Wayman*, 23 U.S. (10 Wheat.) at 4–6)).

236. 380 U.S. 460 (1965).

237. *Id.* at 472.

238. See, e.g., Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 474 (1997) (discussing the limitation that "the Court cannot constitutionally employ its rulemaking power to achieve such substantive aims," but noting that the Court has never enforced it); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 978 (1998) (noting the Court's adherence to "its strong presumption of the validity of the Federal Rules").

239. See, e.g., Louise Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives*, 122 U. PA. L. REV. 594, 596, 599–600 (1974) (arguing for restraint on the national lawmaking power based on national policies, such as "economy of federal lawmaking effort," "smooth functioning of the federal system," avoidance of "disruption of settled local arrangements," and avoidance of "duplicate sets of laws governing similar conduct."); see also Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L. J. 1781, 1787–88, 1841 (1994) (arguing for an amendment of Federal Rule of Evidence 501 to provide for deference to state privileges in most cases).

240. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001); see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (holding federal law regarding enforceability of forum selection clauses, not state law, governed transfers under 23 U.S.C. § 1404); *Burlington N.R.R. v. Woods*, 480 U.S. 1, 7–8 (1987) (holding Federal Rule of Appellate Procedure 38, not state law, governed the issue of damages after an unsuccessful appeal).

241. See, e.g., *Felder v. Casey*, 487 U.S. 131, 153 (1988) (finding that federal civil rights law prevented the state from applying its notice-of-claim rule in a federal civil rights action filed in state court); *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952) (holding federal law determines the validity of a release under the Federal Employers Liability Act (FELA)); *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 296 (1949) (finding that the federal pleading test should have been

B. *The Constitutionality of a Rule Dealing with Selective Waiver*

It is difficult to argue that a rule governing the effect of a disclosure outside of the litigation process—disclosure to an administrative agency—is within the power of Congress under Article III.

Despite Congress's wide latitude to enact procedural rules, which is established both in the cases and the legal literature, *Hanna's* language would have to be considered on its face—the rule would have to be rationally capable of classification as either substantive or procedural. Fairly recent cases, although not invalidating rules of procedure, have interpreted the rules somewhat narrowly to avoid application in a way that might conflict with state substantive policy.²⁴²

A rule having an effect beyond disclosure in the course of litigation would likely face a challenge that it could not be rationally classified as procedural. While arguments in support of such a rule exist—for example, the most significant likely impact of the waiver rules would be in the federal courts—there is significant risk that a court would not find the rule binding against the states.

In order to provide more constitutional comfort for a rule dealing with disclosures outside the litigation process, Congress's commerce powers must come into play. A strong argument has been made for a federalized attorney-client privilege enacted by Congress under its Commerce Clause powers found in Article I, Section Eight, Clause Three. If the power exists to enact a federalized attorney-client privilege, then presumably a rule that affected only an aspect of that privilege (and its close relative, work product protection) would also pass constitutional scrutiny. In his article, *Federalizing Privilege*, Timothy P. Glynn argues that Congress has the power under the Commerce Clause to enact a federal attorney-client privilege law that applies to the states.²⁴³ He recognizes that the Supreme Court has served notice that Congress's powers under the Commerce Clause have outer boundaries.²⁴⁴ For example, in *United States v. Lopez*,²⁴⁵ the Court invalidated as beyond the Commerce Clause powers an act making the possession of a gun on or near school premises a crime.²⁴⁶ In *United States v. Morrison*,²⁴⁷ the court took the same action with regard to an act providing a federal civil remedy for the victims of gender-motivated violence.²⁴⁸ Glynn points out the obvious differences

applied in a FELA action filed in state court).

242. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) (interpreting settlement class certification under Federal Rules of Civil Procedure Rule 23 in light of constitutional limitations on the powers of Congress); *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429–31 (1996) (applying Federal Rules of Civil Procedure Rule 59 and the state law test for granting a new trial on grounds of excessiveness); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96–97, 108–09 (1991) (incorporating state law limitations on the application of Federal Rules of Civil Procedure Rule 23.1, dealing with the demand requirement in a shareholder derivative action).

243. Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 156–71 (2002).

244. See *id.* at 158.

245. 514 U.S. 549 (1995).

246. *Id.* at 551.

247. 529 U.S. 598 (2000).

248. *Id.* at 613, 617–19.

between legislation such as that involved in *Lopez* and *Morrison* and a regulation that arguably, at least, “fosters and protects . . . economic and commercial activity . . . between attorneys and clients.”²⁴⁹ He adds that “[t]he attorney-client privilege protects communications upon which the industry’s article of commerce—the provision of legal services—depends.”²⁵⁰

Glynn also raises the possibility that congressional action might be limited by Tenth Amendment considerations.²⁵¹ There are recent cases that place limits on congressional action because of a violation of federalism principles. For example, in *New York v. United States*,²⁵² the Supreme Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act because it, in effect, required states to implement legislation.²⁵³ Likewise, in *Printz v. United States*,²⁵⁴ the Court invalidated a provision in the Brady Handgun Violence Prevention Act that required law enforcement officers to administer a federal program.²⁵⁵ On the other hand, in *Reno v. Condon*,²⁵⁶ the Court upheld a provision of the Driver’s Privacy Protection Act that made no such demands on state legislators or local executive officials.²⁵⁷

A rule adopting the principle of selective waiver and applying it to the states would make no demands on the states like the legislation in *New York* and *Printz*. The rule is self-executing. It would simply need to be enforced by the courts of the state. At least one author, Anthony J. Bellia Jr., has questioned the power of Congress under the Tenth Amendment to enact procedural rules unconnected with substantive federal rights.²⁵⁸ However, the legislation that was the focus of Bellia’s article, the Y2K Act, involved notice to defendants before commencing suit²⁵⁹—not a matter as integrally connected to the regulation of legal commerce as the rule proposed here. Arguably, the attorney-client related protections involve substantive protections.²⁶⁰ The “privilege regulates, indeed protects and promotes, primary conduct and commercial activity—attorney-client communications and the provision of legal services—and serves interests wholly extrinsic to the litigation in which it is asserted.”²⁶¹

One could argue that Glynn takes the concept of a federal attorney-client privilege too far, both politically and as a matter of policy, by proposing a federal law that totally supplants state attorney-client privileges. More modest legislation

249. Glynn, *supra* note 243, at 158.

250. *Id.* at 159.

251. *Id.* at 162.

252. 505 U.S. 144 (1992).

253. *Id.* at 188.

254. 521 U.S. 898 (1997).

255. *Id.* at 935.

256. 528 U.S. 141 (2000).

257. *Id.* at 151.

258. Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 970–73 (2001).

259. *Id.* at 954.

260. See Glynn, *supra* note 243, at 164–65.

261. *Id.*

dealing simply with the existence and scope of waiver seems more likely to be upheld, especially if the legislation is limited to the effect of disclosures made at the federal level.²⁶² Controlling subsequent use of matters disclosed in federal proceedings or disclosed to federal regulators in all courts, state and federal, is essential if such limitations are to be meaningful to the parties. As discussed in Part VII.B, controlling disclosures occurring in state proceedings or to state regulators is another matter.

VI. PROPOSED FEDERAL RULE 502: BACKGROUND OF PREPARATION AND SPECIFICS OF THE RULE

Sections A and B provide a short discussion of how Proposed Rule 502 was prepared and ultimately approved for public comment. Section C then sets forth the text of the Rule and its intended application.

A. Process of the Rule Proposal

On January 23, 2006, Honorable F. James Sensenbrenner, Jr., Chair of the House Committee on the Judiciary, wrote a letter to Ralph Mecham, Director of the Administrative Office of the United States Courts, requesting that the Judicial Conference “initiate a rule-making on forfeiture of privileges.”²⁶³ Congressman Sensenbrenner explained the reason for seeking a rule on waiver:

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the Judicial Conference to proceed with a rule-making that would –

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without

262. The likely validity of such legislation dealing with attorney-client privilege or work product protection may not extend to a statute that would attempt to apply the same rules to evidentiary privileges generally. Perhaps one could argue that in many contexts the psychotherapist-patient privilege has some effect on commerce, although the concept stretches one's imagination. It is even more difficult to argue for a statute that would affect privileges for marital or clergy communications. Other privileges such as those involving law enforcement and the qualified journalist's privilege may involve additional constitutional analyses, including a determination of the impact of the provisions on First or Sixth Amendment considerations.

263. Letter from Hon. F. James Sensenbrenner, Jr., Chair of the U.S. Cong. Comm. on the Judiciary to Leonidas Ralph Mecham, Dir. of the Admin. Office of the U.S. Courts 1 (Jan. 23, 2006) (on file with authors).

waiving all privileges as to other parties in subsequent litigation.²⁶⁴

Congressman Sensenbrenner recognized that “implementation of such a rule would require approval by an act of Congress in accordance with the Rules Enabling Act” and that “legislation would also be needed to extend the rule’s protection to subsequent litigation in state court.”²⁶⁵ He concluded that a federal rule protecting parties from waiver “could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants.”²⁶⁶

B. Initial Draft of Proposed Rule 502

In response to the letter from Congressman Sensenbrenner, the Evidence Rules Advisory Committee directed the authors of this Article to prepare a discussion draft that would respond to the Congressman’s concerns. The draft was intentionally written to provide broad protection against waiver and also to provide a uniform rule on waiver for federal and state courts, no matter where the disclosure of information occurred. The idea was to provide for the broadest possible provisions and allow the Advisory Committee to cut back if it thought the draft went too far.

1. Text of the Initial Draft

The initial draft of Proposed Rule 502 provided is as follows:

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

(a) Waiver by disclosure in general.—A person waives an attorney-client privilege or work product protection if that person—or a predecessor while its holder—voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general.—A voluntary disclosure does not operate as a waiver if:

- (1) the disclosure is itself privileged or protected;
- (2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings—and if the holder of the privilege or work product protection took

264. *Id.*

265. *Id.* at 2.

266. *Id.*

reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

(c) Controlling effect of court orders.—Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements.—Notwithstanding subdivision (a), an agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection.—As used in this rule:

1) “attorney-client privilege” means the protections provided for confidential attorney-client communications under either federal or state law; and

2) “work product” means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common-law and state-enacted provisions or common-law rules providing protection for attorney work product.²⁶⁷

2. *Changes to the Initial Draft*

After conducting a hearing on the draft rule, the Advisory Committee decided to cut back on some of its more dramatic provisions.²⁶⁸ Part VII analyzes the Advisory Committee’s reasoning for its changes. The basic changes agreed upon by the Advisory Committee were as follows:

1. Instead of providing a broad rule governing all waivers by disclosure, the rule should provide for certain situations in which a waiver will *not* be found, even though it otherwise might be found under common law.²⁶⁹ Those situations should track the concerns of the Sensenbrenner letter, specifically a) subject

267. Advisory Committee on the Federal Rules of Evidence, Initial Draft of Proposed Rule 502 (April 24, 2006) [hereinafter Initial Draft of Proposed Rule 502] (on file with authors).

268. JUDICIAL CONFERENCE REPORT, *supra* note 33, at 2.

269. *See id.* at 2–3.

- matter waiver; b) inadvertent disclosure; c) selective waiver; and d) confidentiality orders.²⁷⁰
2. The controversy over selective waiver warrants bracketing that provision for public comment, indicating to the public that the Advisory Committee has not definitively decided to propose the provision, and would especially appreciate public input on its merits, particularly on whether the rule is necessary or useful to encourage cooperation and limit the cost of government investigations.²⁷¹
 3. Comity principles warrant against proposing a rule that would extend to disclosures made at the state level, that is, in state proceedings or before state regulators. Control over state disclosures might come through separate legislation, but the Advisory Committee found that a Federal Rule of Evidence was not a proper vehicle for regulation of disclosures at the state level.²⁷²

The Advisory Committee did adhere to the following important policy choices made in the initial draft:

1. *Subject matter waivers should be found only if fairness so requires.* The Advisory Committee determined that any broader use of subject matter waiver would lead back to the unwarranted expenses that the Rule purports to regulate.²⁷³
2. *Inadvertent disclosures should be waivers only if a requesting party can show that the disclosing party failed to take proper measures a) at the time of disclosure and b) in seeking return of the information.*²⁷⁴ This is the predominant approach to inadvertent disclosures taken by the federal courts,²⁷⁵ and the Advisory Committee believed that this negligence-based approach avoided the problems of either an “all” or “nothing” approach to inadvertent disclosure.²⁷⁶ The “all” approach—all mistaken disclosures are waivers—unjustifiably increases the costs of preproduction privilege review. The “nothing” approach—inadvertent disclosures are never waivers—could encourage sloppiness, as well as gamesmanship by parties who claim that their “inadvertent” disclosures have tainted their adversaries’ cases.²⁷⁷

270. See *infra* Part VII.

271. See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES (revised June 30, 2006), FED. R. EVID. 502(c) (Proposed 2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf [hereinafter REVISED JUDICIAL CONFERENCE REPORT] (including a footnote that was added to the Proposed Rule prior to being released for public comment).

272. See *id.* at FED. R. EVID. 502 advisory committee’s note (Proposed 2006); *infra* Part VII.B.2.

273. See REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, at 2; *supra* Part III.

274. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502 advisory committee’s note (Proposed 2006).

275. See *supra* text accompanying notes 54–61.

276. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502 advisory committee’s note (Proposed 2006).

277. See *id.*

3. *Confidentiality orders entered by a federal court must bind nonparties.* The Advisory Committee noted that if non-parties were not bound, the parties to the order could not rely upon it in disclosing information for fear that a court could find the information “waived” in a subsequent litigation—leading, once again, to the heavy expenditures of preproduction privilege review that the Rule is designed to regulate.²⁷⁸
4. *Federal law on federal disclosures must be binding on the states.* The Advisory Committee determined that while Rule 502 should not govern state disclosures, it needs to bind state courts to the federal rule on *federal* disclosures. Otherwise, the rule could not be relied upon by counsel determining the consequences of a disclosure at the federal level.²⁷⁹

C. Proposed Rule 502

The text of the revised version of Proposed Rule 502, as approved by the Advisory Committee and the Standing Committee for release for public comment,²⁸⁰ provides as follows:

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

(a) Scope of waiver.—In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure.—A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings—and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

[(c) Selective waiver.—In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its

278. *See id.*

279. *See infra* Part VII.B.1.

280. *See* Federal Rulemaking, *supra* note 193 (describing the action of the standing committee).

regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders.—A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements.—An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(f) Included privilege and protection.—As used in this rule:

1) “attorney-client privilege” means the protection provided for confidential attorney-client communications, under applicable law; and

2) “work product protection” means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.²⁸¹

281. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(c) (Proposed 2006). When released for public comment, a footnote was included after Subsection (c), which provides,

The bracketing indicates that while the Committee is seeking public comment, it has not yet taken a position on the merits of this provision. Public comment on this “selective waiver” provision will be especially important to the Committee’s determination. The Committee is especially interested in any statistical or anecdotal evidence tending to show that limiting the scope of waiver will 1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions.

As the Committee has taken no position on the bracketed provision, it is obvious that there is nothing in the proposed rule that is intended either to promote or deter any attempt by government agencies to seek waiver of privilege or work product.

Id. at 6.

The Committee Note to Proposed Rule 502, as revised, explains the reasoning behind the Rule, the need for the Rule, and provides a justification for some of the policy choices made by the Advisory Committee. The Committee Note provides as follows:

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine—specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425–26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another defendant \$247,000, and that such review would take months). *See also* [JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 27 (2005)] (“The volume of [the] information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. [Mayor] of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable. For example, if a federal court’s

confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. *See* 28 U.S.C. § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. *Cf.* Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 ([5th] Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *[B]yers v. Bursleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver—"ought in fairness"—is taken from Rule 106, because the animating principle is the same. A party that makes

a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 ([5th] Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. [Mayor] of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576–77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F. Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to “inadvertent” disclosure, as opposed to using any other term, because the word “inadvertent” is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the “consequences of inadvertent waiver”); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993)

(“There is no consensus, however, as to the effect of inadvertent disclosure[s] of confidential communications.”).

[**Subdivision (c).** Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of “selective waiver,” holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the “public interest in easing government investigations” justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the

information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.]

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver “may add cost and delay to the discovery process for all [parties]” and that courts have responded by encouraging counsel “to stipulate at the outset of discovery to a ‘nonwaiver’ agreement, which they can adopt as a case-management order”). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. [Mayor] of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver

where the parties stipulated in advance that certain testimony at a deposition “would not be deemed to constitute [any] waiver of the attorney-client or work product privileges”); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into “so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents”). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

Subdivision (f). The rule’s coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.²⁸²

VII. DRAFTING ALTERNATIVES

The Committee made a number of important policy decisions in drafting Proposed Rule 502.²⁸³ The major choices, and the alternatives taken, can be described as follows:

- a. Should the Rule determine when the privilege or work product protection is waived, or should the question of waiver be left to the common law and the rule focus on *exceptions* to the common law waiver rules? The Advisory Committee ultimately decided to leave the basic question of

282. See *id.* at FED R. EVID. 502 advisory committee’s note (Proposed 2006).

283. The authors of this Article were charged by the Advisory Committee to prepare a first draft of Proposed Rule 502. The Advisory Committee reviewed the draft and took testimony from members of the bench, bar, and academia as part of its Spring 2006 meeting. See *supra* Part VI.B (outlining the first draft of the Rule). The Committee then conferred and agreed on a number of drafting changes. These changes were implemented by the co-authors; the Proposed Rule, set forth at *supra*, text accompanying note 271, was unanimously approved by the Committee and then by the Standing Committee. In this section the authors attempt to describe the Committee’s views, as expressed during the Committee meeting and in the vote on Proposed Rule 502, but the authors do not intend to speak for the Committee.

waiver to common law, so that the Rule is one that establishes exceptions to whatever waiver rules currently exist.

- b. To what extent should the Rule cover state court decisions on waiver? The Advisory Committee ultimately decided that the Rule should not establish a waiver rule or exception for any disclosure made in a state proceeding or to a state regulator. However, the Committee found it critical for the federal Rule to govern disclosures made at the federal level, either in a federal proceeding or to a federal regulator, even if the information is sought to be used in a subsequent state court proceeding. Otherwise, the Rule would substantially undermine the predictability necessary for counsel to determine the consequences of disclosure at the federal level.
- c. Assuming selective waiver should be enforced, should the Rule require a confidentiality agreement between the client and the regulator? The Committee decided that a confidentiality agreement should not be a necessary condition for limiting the scope of a waiver to a regulatory authority.

A. Waiver Rule or Exception-to-Waiver Rule?

The initial draft of the Rule, subdivision (a), provided that any voluntary disclosure of privilege or work product constituted a waiver, but that the scope of such a waiver would not extend to related undisclosed material unless fairness required such a drastic result.²⁸⁴ However, after the Advisory Committee hearing on the Rule, the Committee realized that problems would arise if the rule purported to establish that all “voluntarily” disclosed material constituted a waiver.²⁸⁵ First, under common law, voluntary disclosures do not always constitute waivers. Examples include disclosures to nonclients sharing a common interest;²⁸⁶ disclosures to experts and others necessary for a lawyer’s representation;²⁸⁷ and disclosures to corporate personnel on a “need to know” basis.²⁸⁸ The Committee had no desire to change these common law doctrines under which a waiver would not be found.²⁸⁹ Furthermore, if the Rule provided that all voluntary disclosures constituted waivers, it would then be necessary to craft exceptions to that waiver

284. See *supra* text accompanying note 267.

285. See, e.g., HEARING ON PROPOSAL 502, *supra* note 19, at 36–37 (statements of Gregory F. Joseph, attorney, and unknown male) (voicing concern over the initial draft of Proposed Rule 502(a), which provided that all voluntary disclosures constitute waivers.)

286. On the common interest rule, see STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL RULES OF EVIDENCE MANUAL* 501-35 to -37 (9th ed. 2006).

287. See, e.g., *United States v. Kovel*, 296 F.2d 918, 922–23 (2d Cir. 1961) (explaining that the attorney-client privilege extends to communications to a nonlawyer when the nonlawyer is hired by the lawyer and is necessary to the representation).

288. See, e.g., *FTC v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (quoting *FTC v. GlaxoSmithKline*, 203 F.R.D. 14, 19 (D.D.C. 2001) (finding no waiver of privilege where communications are sent to corporate personnel on a need-to-know basis).

289. See REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED R. EVID. 502 advisory committee’s note (Proposed 2006).

rule for each of these lines of common law authority, even though there was no real controversy over any of these lines of authority and no real necessity for their codification. The Committee was not confident that it could find, and attempt to codify, all of the exceptions to the basic principle that a voluntary disclosure constitutes a waiver. There was legitimate concern that any attempt to do so would be underinclusive and would result in an inadvertent and unwarranted change to the common law waiver rule.

Second, there is often a fine line between whether a privilege has been waived and whether a communication was privileged in the first place. An example of this distinction is the *Garner* doctrine, under which statements made to counsel by a fiduciary are not privileged as to the beneficiaries.²⁹⁰ One could credibly look at this doctrine as either a waiver of privilege, or as a doctrine holding that no communication from the fiduciary to counsel was privileged in the first place, as to the beneficiaries, because of the expectation that the statements were made for their benefit.²⁹¹ Another example is a statement made by a client to his attorney with the expectation that it could be disclosed to the public at some later point—for example, communications made so that the attorney can draft the provisions of a contract.²⁹² One could credibly argue that this doctrine is grounded in waiver—that the privilege is lost when the communication is disclosed to the public—though the better analysis is probably that the communication was never privileged in the first place because there was no expectation at the time of the communication that it would remain confidential. A final example of the fine line between waiver and privilege is the crime-fraud exception.²⁹³ The crime-fraud exception has been treated as a freestanding exception to the privilege,²⁹⁴ but it could credibly be examined under a waiver analysis; the client waives the privilege when communicating with the attorney with the intent to further a crime or fraud.

Because of this fine line between waiver of privilege and whether a communication is privileged at all (or whether there is some other exception), the Committee was wary of attempting to establish a basic rule that all voluntary disclosures constitute waivers unless there is an enumerated exception within the

290. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103–04 (5th Cir. 1970). For a discussion and critique of the *Garner* doctrine, and its extension beyond shareholder suits to other fiduciary relationships, see Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 HOFSTRA L. REV. 817, 844–47 (1984).

291. *Id.* at 1101.

292. See, e.g., *In re Grand Jury Proceedings*, 33 F.3d 342, 354–55 (4th Cir. 1994) (finding the information used by counsel to prepare SEC filings was not privileged because all that was revealed were matters communicated to the attorneys “for their use in connection with public disclosures which made the communications and data underlying them non-privileged under the relevant case law”); *United States v. (Under Seal)*, 748 F.2d 871, 875–76 (4th Cir. 1984) (holding communications were not privileged where they were to be used by the attorney to prepare a public document, and where the client did not impose a conditional limitation on the disclosure of the information).

293. For a discussion of the crime-fraud exception to the attorney-client privilege, see SALTZBURG, MARTIN & CAPRA, *supra*, note 286, at 501–56 to –60.

294. *Id.*

rule. The Committee saw a risk in unnecessarily altering long-standing common law principles establishing the existence or nonexistence of a privilege.

Third, it must be remembered that the Rule is designed to cover waiver consequences for both the attorney-client privilege and the work product protection. It is unclear whether a voluntary disclosure of work product has the same consequences in all situations as a voluntary disclosure of a privileged communication.²⁹⁵ For example, the common interest rule can play out differently for privilege and work product protection: the nonclient must be pursuing a common legal objective for the privilege to hold, whereas the work-product protection may apply so long as the material is not turned over to an adversary in litigation.²⁹⁶ The Committee was therefore wary about establishing a single voluntary-disclosure-equals-waiver rule for both privilege and work product.

Finally, the Committee was concerned about merits of a general rule that a voluntary disclosure constitutes a waiver. It is not obvious that every disclosure of privilege that can be deemed voluntary, in the sense that it is not compelled by a court order, should be presumed to be a waiver. For example, the American Bar Association has charged that DOJ employs a policy under which a corporation or individual will be threatened with prosecution unless privileged material is voluntarily turned over to the government; the charge is that the DOJ gauges "cooperation" by the willingness to turn over privileged material.²⁹⁷ DOJ officials have denied that there is such a standing practice,²⁹⁸ but whatever the reality, this situation demonstrates that reasonable minds can differ about whether a regulator's demand for waiver of privilege (either as a standing practice or on a case-by-case basis) results in a voluntary disclosure of that information.²⁹⁹ Although there is no court order mandating the turnover of information, in reality, it often appears that the client has no choice but to cooperate. The Committee did not want to interject

295. See *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 233 n.8 (D. Md. 2005).

296. See, e.g., *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981) (finding waiver of privilege, but no waiver of work product protection, where communications are turned over to a regulator).

297. See Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Department of Justice, to the Heads of Department Components and U.S. Att'ys, *Principles of Federal Prosecution of Business Organizations* 6–7 (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf (noting that "[o]ne factor the prosecutor may weigh in assessing the adequacy of the corporation's cooperation" is a waiver of privilege and work product protection); see also TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE, RESOLUTION ADOPTED BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 1, 13–22 (2005), available at <http://www.abanet.org/poladv/report111.pdf> (opposing the allegedly routine practice of seeking waiver of privilege and work product protection as part of any cooperation with the government).

298. See *White Collar Enforcement (Part 1): Attorney-Client Privilege and Corporate Waivers: Oversight Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 1, 2–3 (2006) (statement of Robert McCallum, Assoc. Att'y Gen.), available at <http://www.abanet.org/poladv/testimony306.pdf>.

299. See *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 450 F.3d 1179, 1186–92 (10th Cir. 2006), *cert denied sub nom.*, *Qwest Commc'ns Int'l Inc. v. New England Health Care Employees Pension Fund*, No. 06-343, 2006 U.S. LEXIS 8627 (U.S. Nov. 13, 2006); *supra* text accompanying notes 171–192.

itself into the politics of government demands for the voluntary disclosure of privileged information; it chose instead to limit the consequences of such a disclosure once a court determines it to be voluntary.

For these reasons, the Committee decided to promulgate a rule that would leave it to the common law to determine whether a disclosure of privilege or work product protection was or was not a waiver.³⁰⁰ The Proposed Rule thus operates as follows: *Assuming* that a disclosure is found to be a waiver under the common law, there are certain situations in which the common law doctrine must be abrogated or limited in order to protect against inefficient expenditures in litigation and to provide some predictability for choices made in litigation.

B. Should the Rule Cover State Court Determinations?

1. Disclosures Made at the Federal Level: Subsequent Use in State Proceedings

As discussed above, a major animating principle behind the proposal of Rule 502 is that parties and their counsel must be able to rely on the protections of the Rule. For example, if counsel obtain a confidentiality order allowing each side to take a quick peek of the adversary's materials without a pre-production privilege review, they need to know that the confidentiality order is enforceable in *any* subsequent litigation. Otherwise, the concern of a subsequent finding of waiver would provide a disincentive for parties to use confidentiality agreements and return the parties to the exorbitant expenses of pre-production privilege review that the rule is designed to avoid. Likewise, with selective waiver, if counsel turns over privileged material to a government regulator in reliance on a rule that doing so will not constitute a waiver with respect to private parties, then counsel needs to know that this protection will be enforced in *any* subsequent proceeding. Again, the concern of a subsequent finding of waiver will provide a disincentive to cooperate with the government.

The Committee therefore determined that any rule protecting against waiver for disclosures made at the federal level, either in a federal proceeding pursuant to a confidentiality order or to a federal regulator pursuant to the rule of selective waiver, would have to be binding at both the state and federal level. The Committee was confident that any rule binding state courts to a federal statute protecting disclosures made in federal proceedings was within Congress's powers.³⁰¹

300. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502 advisory committee's note (Proposed 2006).

301. *See supra* Part V (discussing Congress's power to enact Proposed Rule 502).

2. *Disclosures Made at the State Level*

The more difficult question is whether a *federal* law can or should control an initial disclosure made at the *state* level. For example, assume state law provides that disclosure to a government regulator constitutes disclosure for all purposes. Despite the state rule and regardless of the court in which the issue arises, the consequences of a disclosure made to a federal regulator would be governed by Proposed Rule 502.³⁰² But what if the disclosure is made to a *state* regulator? Is there a legitimate justification for overriding the state privilege rule, and should the law in this area be completely federalized?

The initial draft of Proposed Rule 502, prepared by the authors of this Article, provided that the rules on waiver would bind both federal and state courts, regardless of whether the disclosure was made at the federal or state level; it thus opted for full uniformity.³⁰³ The draft relied on a credible basis: that Congress has the power to enact a privilege rule that governs disclosures wherever they are made, whether at the state or federal level.³⁰⁴ Yet the authors recognized that Congress might have the power to enact such a rule, but that did not necessarily mean the Advisory Committee should ultimately propose a rule that would allow federal law to displace state privilege law in all instances. After all, a concern for state prerogatives led Congress to reject the Advisory Committee's original proposals for federal rules of privilege.³⁰⁵ Thus, the authors drafted the Rule broadly to illustrate to the Committee how far the authors thought the Rule *could* go, leaving it to the Committee to make the policy determination as to how far it *should* go.

The Committee believed that any federal rule that governs privilege for information initially disclosed in a state proceeding would need an especially strong justification. The Committee found no such justification. Most of the horror stories, excessive costs of litigation on the one hand and disclosure to regulators on the other, have arisen in federal and not state proceedings.³⁰⁶ Furthermore, it would be a dramatic extension of federal privilege law to promulgate a rule that would, for example, override a state rule on waiver even for a disclosure made at the state level and offered in a subsequent state proceeding.

The Committee was also made aware of concerns expressed by the Judicial Conference, Committee on Federal-State Jurisdiction. In a June 21, 2006 letter to the Chair of the Rules Committee, the Chair of the Federal-State Jurisdiction Committee declared that the first draft of the rule

302. See REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED.R. EVID. 502(c) (Proposed 2006).

303. See *supra* text accompanying note 267.

304. See Glynn, *supra* note 243, at 156–71; *supra* text between notes 266 and 267.

305. For a discussion of the history behind Federal Rule of Evidence 501 and the rejection of the Advisory Committee's proposed privileges, see SALTZBURG, MARTIN & CAPRA, *supra* note 286, at 501–8 to –12.

306. See *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 238–44 (D. Md. 2005) (collecting examples of cases, all from federal litigation).

raised significant concerns for the Federal-State Jurisdiction Committee, which includes three state supreme court chief justices and a former chief justice. That draft would have extended the proposed rule's protection to inadvertent disclosures "made during discovery in federal or state litigation or administrative proceedings" and to selective disclosures "made to a federal, state, or local governmental agency during an investigation by that agency." Essentially, the discussion draft proposed to federalize the rules of waiver and make them applicable in both state and federal proceedings. The draft was intended to facilitate consideration of a full range of options, but the proposed application to state court systems would have constituted a substantial limitation on the authority of state courts to govern their own proceedings.³⁰⁷

Ultimately, the Advisory Committee determined that it would be overreaching to try to control disclosures made at the state level, and that it should focus on the consequences of disclosures initially made in federal proceedings. If Rule 502 ultimately is proposed to Congress, the Committee plans to draft an accompanying letter pointing out that disclosures initially made in state proceedings are not specifically covered, and that if Congress wishes to cover such disclosures, it will have to do so in separate legislation.

For its part, the Committee on Federal-State Jurisdiction noted that the revised proposal for Rule 502, governing only the effect of disclosures made at the federal level, "avoid[s] the significant problems that would have been created by the original draft."³⁰⁸ In the context of the Rule's effect on inadvertent disclosures, the Committee on Federal-State Jurisdiction explained as follows:

As revised, the proposed rule could be viewed as a choice-of-law rule, providing a federal rule to govern the consequences of inadvertent disclosures that take place in federal proceedings, and obligating state courts to respect that federal rule in later proceedings in state court. Viewed in this context, the revised rule appears less intrusive because it does not seek to impose on the state courts a federal rule of what constitutes an inadvertent waiver. Rather, it would require the state courts to respect the federally-defined consequences of an inadvertent waiver that initially occurred in a federal proceeding. Such an approach seems

307. Letter from Honorable Howard D. McKibben, Chair, Comm. on Fed.-State Jurisdiction of the Judicial Conference of the U.S., to Honorable David F. Levi, Chief Judge, U.S. Dist. Court for the E. Dist. of Cal. (June 21, 2006) [hereinafter McKibben Letter] (on file with authors) (quoting Initial Draft of Proposed Rule 502, *supra* note 267).

308. McKibben Letter, *supra* note 307, at 2.

consistent with principles of federalism and comity that exist between the federal and state court systems.³⁰⁹

3. *Disclosures at the State Level: Subsequent Use in Federal Court*

This is not to say that an initial disclosure in a state proceeding or to a state regulator is necessarily controlled by state law if the information is later demanded in a *federal* proceeding. Under Rule 501, privileges in federal question cases are determined by federal common law or federal statute; where state law provides the rule of decision, privilege is governed by state law.³¹⁰ If enacted in its current form, Rule 502 would provide four important federal rules on waiver, but only for disclosures made at the federal level: (1) no subject matter waiver unless undisclosed information ought in fairness to be disclosed; (2) mistaken disclosures are not waivers unless there was negligence in the disclosure and in the failure to seek return; (3) disclosure to a regulator does not operate as a waiver to private parties; and (4) courts can enter confidentiality orders that will bind non-parties, depriving them of the opportunity to argue that a waiver occurred if the disclosure was in accordance with the court's order.³¹¹ What happens if (1) a disclosure is made at the *state* level (in a state court proceeding or to a state regulator); (2) the state law of waiver is different from Rule 502 (in one of the four respects set forth above); and (3) a party seeks to rely on the state law of waiver in a subsequent *federal* proceeding?

The answers are somewhat complicated, but appear to be as follows:

1. *Subject Matter Waiver*: If the state law would find a subject matter waiver for a state disclosure where Rule 502 would not, a party could argue in federal court that state law mandates subject matter waiver, even though fairness does not require it. If the subsequent federal case lies in diversity, then it appears that this argument would be meritorious.³¹² The federal court would have to find a subject matter waiver because state law provides the rule on privileges under Rule 501.³¹³ If it is a federal question case, then a finding on subject

309. *Id.* It should be noted, however, that the Federal-State Jurisdiction Committee ultimately reserved judgment even on the pared-down version of Rule 502 as released for public comment. Some members of the Federal-State Jurisdiction Committee expressed concern that "requiring all states to adhere to a uniform rule based upon the treatment of disclosures in the course of federal litigation may undermine the traditional control that state courts have exercised over the application of waiver rules." *Id.* at 3. The Committee also noted that some of its members "took the position that state courts should be free to determine what constitutes a waiver, even where the waiver occurred in an earlier federal proceeding." *Id.*

310. *See* FED. R. EVID. 501.

311. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502 (Proposed 2006).

312. *See* FED. R. EVID. 501 advisory committee's note.

313. *See id.*

matter waiver would depend on federal common law,³¹⁴ Rule 502 does not govern because it applies only to disclosures made at the federal level.³¹⁵

The federal common law on subject matter waiver was previously discussed, and as noted, the federal courts are not uniform.³¹⁶ This means that in federal question cases, the existence of a subject matter waiver for disclosures initially made at the state level may vary from court to court (though it might be hoped that the common law will fall into a uniform line because of the persuasive effect of Rule 502).

2. *Inadvertent Disclosures*: Assume that a party makes a mistaken disclosure in a state proceeding with a waiver rule different from that provided in Rule 502. For example, the state law mandates that a mistaken disclosure is always a waiver. Will that state rule be enforced in a subsequent federal proceeding? The answer is Yes if the action lies in diversity; as previously explained, Rule 501 provides that state law of privilege applies in diversity, and the waiver standard in Rule 502 does not control because it applies only to disclosures made at the federal level. If it is a federal question case, the effect of the disclosure will be governed by federal common law, which is not uniform. But again, it can be hoped that the federal common law, as applicable in this narrow area, will eventually come into line with Proposed Rule 502's standard for federal disclosure.
3. *Selective Waiver*: Rule 502 *would* have some effect on disclosures initially made to state regulators and offered by private parties in subsequent federal proceedings. The selective waiver provision of Rule 502 currently provides specific language indicating that the effect of a state disclosure to a regulator is governed by state law.³¹⁷ If this language ultimately is enacted, it would mean that, as a matter of federal law, the effect in a federal proceeding of a disclosure made to a state regulator is governed by state law. Thus, the proposed language incorporates the relevant state law on waiver and makes it federal law for this particular purpose. As such, it overrides the federal common law that would otherwise apply. The applicable state law on waiver would thus apply in both state and federal cases.³¹⁸

314. *See id.*

315. *See* REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(c) (Proposed 2006).

316. *See supra* Part III.

317. *See* REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(c) (Proposed 2006).

318. It is possible that the language of the Rule, deferring to state law as a matter of federal law, could create a problem if there are disclosures to regulators in a number of states, and the state law on waiver is different in those states. For example, assume that a corporation discloses privileged information to a regulator in *State 1*, where the disclosure operates as a waiver to private parties, and discloses the same information to a regulator in *State 2*, where disclosure does not operate as a waiver to private parties. If an action is now brought in federal court by a private party, does that private party get the information? Proposed Rule 502 provides that the effect of a waiver is governed by state law, but which state's law is applicable? Presumably the answer is found in federal common law choice of law rules.

One might ask why state law is incorporated into federal law for purposes of selective waiver, but federal common law applies for the other matters addressed by Proposed Rule 502, specifically subject matter waiver and inadvertent disclosure. It must be said that the Committee, in adding language concerning the applicability of state law to disclosure to state regulators, did not consider in detail the choice of law questions that arise with respect to subject matter waiver and inadvertent disclosure. These are the kinds of complexities that are sorted out in the public comment period. The Committee might decide that special treatment is necessary for selective waiver, given the controversy over that doctrine. It might be thought too drastically contrary to comity to impose a federal law based on the premise of limiting the costs of government investigations, where the investigation is being pursued by a state entity in a state without a selective waiver provision. Shouldn't the decision of whether selective waiver is useful in limiting the cost of state investigations be left to the state?³¹⁹

It is also possible that the Committee will decide that uniform choice of law treatment is necessary with regard to subject matter waiver, inadvertent waiver, and selective waiver as to disclosures made at the state level where use is sought in subsequent federal proceedings. This decision can be adopted in one of three ways:

- a. The language in the selective waiver subdivision providing that "[t]he effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law"³²⁰ could be deleted. This modification would give selective waiver the same choice of law rule as subject matter waiver and inadvertent waiver; where the disclosure is made at the state level and the protected

A different problem under Proposed Rule 502 arises when the corporation discloses privileged material to both a federal and state regulator, and the state disclosure is made in a state that does not recognize selective waiver. In a subsequent federal action brought by a private party, does the private party get access to the privileged material? Here the question is not really one of choice of law, since it is clear that federal law governs under Rule 501. *See* FED. R. EVID. 501. The problem is that the Proposed Rule provides different consequences for state and federal disclosures. *See* REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(c) (Proposed 2006). If Rule 502 is enacted in its current form, it will probably mean that any disclosure to a state regulator in a state without a selective waiver rule will operate as a waiver to private parties, even if the disclosure would be protected insofar as it was made to a federal regulator.

This is not an anomalous result. It simply means that federal legislation is deferring to state prerogatives concerning the effect of disclosures of privileged information when made at the state level. As a practical matter, it means that counsel needs to inform the client that any disclosure to a state regulator in a state without a selective waiver rule will likely constitute a complete waiver to private parties, even in subsequent federal litigation.

319. This assumes, of course, that selective waiver will become a part of Rule 502. As released for public comment, the selective waiver provision is in brackets. The Committee is seeking public comment, but it has not yet decided on the merits of selective waiver. *See supra* note 281.

320. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(c) (Proposed 2006).

information is offered in a federal proceeding, the state waiver rule would govern diversity cases and the federal common law waiver rule would govern federal question cases.

- b. The language in the selective waiver subdivision providing that “[t]he effect of disclosure [at the state level] is governed by applicable state law”³²¹ could be replicated in the provisions governing subject matter waiver and inadvertent waiver. The result of this modification would be that the choice of law rule for all three provisions would be consistent, but the actual law chosen would be different from the first option above for federal question cases. This change suggests that state law would determine waiver where the disclosure occurs at the state level and the protected information is proffered in a subsequent federal proceeding. This result would give primacy to comity principles, but it might result in increased uncertainty for counsel in determining whether to rely on Rule 502.
 - c. The Proposed Rule could be changed to provide that if disclosure is made at the state level, its effect in a subsequent federal proceeding is governed by Rule 502. For example, if a disclosure is made in a state proceeding in a state in which inadvertent disclosures are always waivers, the use of the disclosed information in a subsequent federal proceeding would not be automatic and would depend on whether the standards of Rule 502 have or have not been met (whether the party reasonably guarded against disclosure and diligently sought return of the protected information). This option would provide the greatest certainty for parties because they would know they could rely on Rule 502 whether the disclosure of protected information was made at the federal or state level.³²² This option, however, is the most offensive to comity principles because it overrides state law on privileges even where disclosures are made at the state level. While Congress may wish to enact such a law, it may be difficult for the Advisory Committee to propose a rule overriding state law as to state disclosures, given the concerns of the Judicial Conference Committee on Federal-State Jurisdiction.³²³
4. *Confidentiality Orders*: Proposed Rule 502 does not purport to determine the effect of a confidentiality order that is entered by a state court when the information is sought in a subsequent federal proceeding.³²⁴ Nor does Rule 501 apply.³²⁵ The enforceability in federal court of a state court order is not a

321. *Id.*

322. *Id.* at FED. R. EVID. 502 advisory committee’s note (Proposed 2006) (emphasizing that Rule 502 does not apply to state disclosures later offered in state litigation).

323. See *supra* text at notes 307–09 (discussing concerns expressed by the Judicial Conference Committee on Federal-State Jurisdiction).

324. See REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(d) (Proposed 2006) (dealing, in subsection (d), only with federal court orders that incorporate parties’ confidentiality agreements).

325. See FED. R. EVID. 501.

question of privilege at all, but rather is governed by law providing the respect that federal courts must give to state court determinations.³²⁶ Neither Rule 501 nor Rule 502 purports to alter that longstanding body of law.

4. *Federal Rule of Evidence Governing Use in State Courts?*

As discussed above, Proposed Rule 502 does not attempt to impose federal law when disclosures are made at the state level, but it does bind state courts to a uniform federal rule when disclosures are initially made at the *federal* level. Is it appropriate for a Federal Rule of Evidence to extend its reach to a state court determination? To clarify, the question raised at this point is not whether Congress has the power to enact such a rule; the question instead is whether it is advisable to place such a rule in the Federal Rules of Evidence.

There is undeniably some tension between Proposed Rule 502 and Federal Rule of Evidence 1101(a), which states that the rules apply to “the United States district courts.”³²⁷ One might argue that Rule 1101(c) resolves any anomaly by providing that rules of privilege apply to “all stages of all actions, cases, and proceedings.”³²⁸ But one could also argue that the term “all” is implicitly limited by subdivision (a), which refers to federal proceedings only.³²⁹

Given the fact that it is critical to cover both state and federal proceedings with the same waiver standards, at least as to disclosures initially made in a federal context, is there any drafting alternative to that taken in Proposed Rule 502? One alternative would be simply to cover only federal proceedings in the Rule and leave state proceedings to parallel legislation adopted by Congress. This alternative would eliminate all references to state proceedings from the Rule, and a separate letter to Congress would stress the need for conforming legislation that covers state proceedings.

The Committee decided to include state proceedings within the text of the rule, at least at this point, to make the public aware that there is an explicit intent to cover state proceedings in any legislative attempt to promulgate a rule protecting against waiver when the disclosure is initially made at the federal level. That intent would not be as clear if the references to state proceedings were taken out of the text of the draft and left to an explanation in some kind of covering letter. The Committee thought it better to provide notice about the reach of the rule in the text of the rule, and to leave it to Congress to determine whether to enact a single rule

326. See, e.g., 28 U.S.C. § 1738 (2000) (providing that state judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken”; see also 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 26.106[1] n.5.2 (3d ed. 2006) (citing *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 499 (D. Md. 2000)) (noting that “courts asked to modify another court’s protective order are constrained by principles of comity, courtesy, and, when a court is asked to take action with regard to a previously issued state court protective order, federalism”).

327. FED. R. EVID. 1101(a).

328. FED. R. EVID. 1101(c).

329. FED. R. EVID. 1101(a).

or parallel legislation binding state courts. The Committee intends to make it clear to Congress that whatever path it takes regarding this legislation, it is critical that states must be bound by the federal rule governing disclosures made at the federal level.

C. Enforcing Selective Waiver Even Without a Confidentiality Agreement

As discussed above, a number of courts suggest that they would enforce selective waiver only if the client has entered into a confidentiality agreement with the government regulator.³³⁰ A few courts enforce selective waiver even without such an agreement.³³¹ The Committee has not taken a final position on selective waiver; the language in Rule 502 providing for selective waiver has been bracketed, meaning that the Committee is undecided and is including the provision in order to obtain public comment on the issue. This is not surprising, as the selective waiver provision is clearly the most controversial provision in the Proposed Rule.³³²

The Committee has decided, however, that if a selective waiver provision is included, the provision should not require confidentiality agreements as a condition for protection against a full waiver. The Committee concluded that a confidentiality agreement requirement would not fully implement the policy of encouraging cooperation with government investigations, the animating principle of any rule enforcing selective waiver. The Committee came to this conclusion for several reasons.

First, the term “confidentiality agreement” is not self defining; many agreements entered into by the SEC contain only conditional confidentiality language.³³³ The conditions include the possibility that the privileged material will be disclosed to other law enforcement officials, and that the confidentiality is maintained “except to the extent that the Staff determines that disclosure is otherwise required by federal law or in furtherance of the SEC’s discharge of its duties and responsibilities.”³³⁴ The Committee concluded that the SEC needs the flexibility provided by these conditions to fulfill its enforcement obligations; the SEC could not be bound to absolute nondisclosure.

The conditional confidentiality agreements currently in play are not very relevant to the question of whether to enforce a selective waiver. The rationale for conditioning selective waiver on a confidentiality agreement is that the party appears to be trying to limit the breadth of the disclosure of the protected information—that is, the party is not trying to abuse the privilege by authorizing

330. *See supra* text accompanying notes 200–05.

331. *See supra* text accompanying notes 130–32.

332. Much of the testimony at the hearing held by the Advisory Committee addressed the selective waiver provision. *See* HEARING ON PROPOSAL 502, *supra* note 19, at 35–53, 68, 77.

333. Memorandum from Helene L. Morrison, Dist. Adm’r, S.F. Office of the Sec. Exch. Comm’n, to the Honorable David F. Levi, Chief Judge, U.S. Dist. Court for the E. Dist. of Cal. 1–2 (Dec. 6, 2005) [hereinafter Morrison Memorandum] (on file with authors) (discussing the SEC’s confidentiality agreements regarding the disclosure of documents during the McKesson investigation).

334. *Id.* at 2 (emphasis omitted) (internal quotation omitted).

widespread disclosure yet at the same time attempting to prevent use by private parties. However, substantial limitations on confidentiality in SEC agreements indicate that government use of protected information after disclosure is likely to be extensive. Thus, the current practice cuts strongly against requiring confidentiality agreements as a condition of selective waiver; such confidentiality agreements do little to protect the privilege.³³⁵

The Committee also noted that congressional legislation introduced in 2003 and supported by the SEC did not require a confidentiality agreement to prevent waiver of the privilege when privileged documents were shared with the SEC.³³⁶ To the extent the Committee is doing Congress's work in drafting Rule 502, the Committee considered this proposed legislation to have some relevance.

The Committee also took note of the SEC's examination program, "which inspects the books and records of brokerage firms, investment advisers and mutual funds."³³⁷ These examinations are not performed pursuant to confidentiality agreements, yet they rely on cooperation and turnover of privileged communications and work product.³³⁸ The Committee concluded that if selective waiver is adopted, it would be as a means to encourage cooperation with government investigations; if this is so, then the encouragement should apply to all aspects of government regulation.

Fundamentally, the Committee concluded that a confidentiality agreement requirement imposed a formalism that would impede efficient cooperation with the government—a formalism that has very little to do with whether it is fair or appropriate to limit the breadth of a waiver of privilege or work product. Essentially the requirement would create additional work for attorneys without an apparent corresponding benefit. The reasoning is probably best explained in a paragraph of the proposed Committee Note:

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the

335. See *supra* notes 175–99 and accompanying text (discussing *In re Qwest Commc'ns Int'l Inc.*, Sec. Litig., 450 F.3d 1179 (10th Cir. 2006), *cert denied sub nom.*, *Qwest Commc'ns Int'l Inc. v. New England Health Care Employees Pension Fund*, No. 06-343, 2006 U.S. LEXIS 8627 (U.S. Nov. 13, 2006)).

336. Morrison Memorandum, *supra* note 333, at 2 (discussing Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th Cong. (2003)).

337. *Id.* at 2–3; see also Mary Ann Gadziala, Assoc. Dir., Office of Compliance Inspections and Examinations, U.S. Sec. and Exch. Comm'n, Speech on the SEC Examination Program: Coordination and Priorities (Feb. 7, 2006), available at <http://www.sec.gov/news/speech/spch020706mag.htm> (describing the SEC examination program).

338. *Id.*

attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.³³⁹

The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.³⁴⁰

VIII. CONCLUSION

We have attempted to set out the justification for Proposed Rule 502 and the reasons behind its language. The Rule is now out for public comment, and we fully expect that there will be considerable discussion of both the need for the Rule and its language. Certainly, the bracketed selective waiver section will be enormously controversial.

Most litigators report that the burden placed on them and on their clients of protecting attorney-client privilege and work product protection during the discovery phase of many civil and white-collar criminal cases has become overwhelming. Something must be done to reduce the costs of such discovery. We believe that Proposed Rule 502 will reduce the expense of the process, yet guard against abuse that may occur with a rule giving carte blanche to turn over privileged documents without any review of their content. Furthermore, the Proposed Rule guards against an alternative rule that disregards fairness considerations by permitting unfettered use of information dealing with the same subject matter as contained in disclosed documents. The Proposed Rule also gives parties the opportunity to agree on disclosure arrangements that not only bind the parties to the agreements but bind others as well. The Rule contemplates an impact not only on future federal court proceedings but also on state court proceedings. We believe that such an impact is justified and necessary if the Rule is to have a real effect on costs to parties, but we expect that public comment will better inform us all as to the tolerance for such an intrusion on previously accepted notions of comity between federal and state courts.

The selective waiver provision is intended to promote a more open dialogue between federal government agencies and individuals or companies investigated by

339. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502 advisory committee's note (Proposed 2006).

340. *Id.*

the agencies. As reflected in the case law, there are good reasons both for permitting disclosure of information limited solely to the agency and for holding that any disclosure results in a waiver as to the entire world. Subsection C sets out a rule that we believe effectively limits the waiver of information disclosed to a federal government agency. The difficult policy decision is whether such a provision is justified. Ultimately, the decision of whether to include the selective waiver section is the kind of public policy decision appropriately left to Congress.³⁴¹

Our position is that Proposed Rule 502, as drafted and submitted for public comment, deals effectively with the issues involving inadvertent waiver, scope of waiver, and selective waiver of the attorney-client privilege and work product protection. We hope that this Article has laid the groundwork for a thorough and meaningful discussion on whether we are right about the effectiveness of our

341. During preparation of this Article, President Bush signed the Financial Services Regulatory Relief Act of 2006 on October 13, 2006. Section 607 of the Act provides protection against waiver for privileged material disclosed to a banking agency or credit union. Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351, § 607, 120 Stat. 1966, 1981 (2006), PL 109-351 (Westlaw). Section 607(a) amends section 18 of the Federal Deposit Insurance Act, 12 U.S.C. § 1828, to provide as follows:

(x) PRIVILEGES NOT AFFECTED BY DISCLOSURE TO BANKING AGENCY OR SUPERVISOR.—

(1) IN GENERAL.—The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.

Financial Services Regulatory Relief Act of 2006 § 607(a).

Section 607(b) provides an identical amendment to section 205 of the Federal Credit Union Act, 12 U.S.C. § 1785. *Id.* § 607(b).

The Financial Services Regulatory Relief Act differs from Proposed Rule 502's provision on selective waiver in some important respects. Most importantly, the Act provides the protection of selective waiver to disclosures made to state regulators. In contrast, Proposed Rule 502 states that the effect of a disclosure to a state regulator is governed by state law. REVISED JUDICIAL CONFERENCE REPORT, *supra* note 271, FED. R. EVID. 502(c) (Proposed 2006). Arguably, the Act's coverage of state disclosures might call for a similar extension in Rule 502—after all, the Committee is essentially drafting a privilege rule for Congress, and Congress appears willing to extend the protection of selective waiver to state-based disclosures. However, it could be argued that congressional authority over banking raises a stronger federal interest than one which might exist with respect to disclosures to other state regulators. Congress might be interested, and justified, in covering disclosures to state banking regulators without trying to cover other state-based disclosures. The Advisory Committee must determine whether the policy animating the Financial Services Regulatory Relief Act can properly extend to protecting disclosures to state regulators across the board.

The major effect of the Act might be the indication that Congress is interested in, and favorably disposed toward, the protection provided by selective waiver. Congress requested that the Advisory Committee prepare Proposed Rule 502. It may behoove the Committee to include a selective waiver provision for Congress's consideration in light of the Financial Services Regulatory Relief Act. The argument would be that the drafters should take account of congressional intent, and therefore Congress should at least have the option to consider a selective waiver provision that would apply beyond the banking area.

drafted language and on the more important issue of whether a rule of this kind is a good idea.

